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# LAW OF EVIDENCE

IN

## CALIFORNIA

CONTAINING

ALL THE STATUTES AND ALL THE DECISIONS  
GERMANE TO THE SUBJECT BASED UPON  
PART IV OF THE CODE OF  
CIVIL PROCEDURE.

*(With Cross-references to Jones on Evidence.)*

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BY

CURTIS HILLYER,  
OF THE SAN FRANCISCO BAR.

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# PREFACE.

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This book is designed as a hand book for the practitioner to be taken into court for ready reference during trials. For that reason it follows the Code of Civil Procedure closely. When the same subject is treated more than one time in the code, the annotations have been placed under the heading which it was thought would be the more natural one. Under each section, however, are found quoted all the cases in our supreme court which cite that particular section. This has been done even at the risk of repetition. Ample cross-references are given under each section head to the corresponding matter in Jones on Evidence, to which volume it is intended the present book shall be a companion.





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# LAW OF EVIDENCE

IN

## CALIFORNIA

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- General Definitions, §§ 1823-1839.
- Title I. Of General Principles, §§ 1844-1870.
- II. Kinds and Degrees of Evidence, §§ 1875-1978.
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- IV. Effect of Evidence, § 2061.
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- VI. Evidence in Particular Cases, and General Provisions, §§ 2074-2103.

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- § 1838. Cumulative evidence defined.  
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### § 1823. Judicial Evidence Defined.

Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

#### *Cross-references:*

Law of evidence includes judicial knowledge, presumptions, etc., section 1825, post; kinds of evidence—primary, secondary, direct, indirect, etc., section 1828, post; relevancy—evidence must correspond with the substance of the material allegations, section 1868, post; facts of which evidence may be given, section 1870, post; provisions as to the law of evidence are equally applicable to trials before a jury or before a court, referee or other officer, section 2103.

See Jones on Evidence, section 2—Definitions of evidence as used in municipal law.

**Evidence in General.**

General rules of evidence are same in both civil and criminal cases: *People v. Murphy*, 45 Cal. 137.

Rules of evidence as to legal and equitable proceedings are governed by the same rules: *Goodwin v. Hammond*, 13 Cal. 168, 73 Am. Dec. 574.

Law of the forum governs in rules of evidence: *Tevis v. Pitcher*, 10 Cal. 465.

**What is Evidence.**

When a witness is called and sworn, an answer which he makes to a question put by the clerk of the court, demanding his name, is a part of his testimony: *People v. Winters*, 49 Cal. 383.

Evidence includes the means by which any alleged matter of fact is established or disproved. Proof is the result or effect of the evidence: *Schloss v. His Creditors*, 31 Cal. 201.

**Power of Legislature Over Rules of Evidence.**

The legislature has the power to change or modify the rules of evidence at any time, and may exclude depositions which were admissible when taken: *Mitchell v. Haggemeyer*, 51 Cal. 108.

Statutes which make a document *prima facie* evidence of the regularity of official proceedings in reference thereto, or which cast the burden of proof in an issue upon either party to the action, are within the constitutional power of the legislature: *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 91.

State legislature has power to declare who shall be competent to testify and to regulate the production of evidence in the courts of the state: *People v. Brady*, 40 Cal. 198, 6 Am. Rep. 604.

The legislature has power to change a rule of evidence after the contract to which the rule applies has been made, and after the action in which the rule is to be applied has been commenced: *Himmelman v. Carpentier*, 47 Cal. 42.

Congress has no constitutional authority to legislate concerning the rules of evidence administered in the courts of the state, nor to affix conditions or limita-

tions upon which those rules are to be applied and enforced: *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617.

The state has the most perfect right to determine what shall constitute evidences of title, as between her own citizens, to all lands within her boundaries, and Congress has no power to interfere therein: *Nims v. Palmer*, 6 Cal. 8.

The legislature has power under the constitution to provide for the taking of depositions conditionally on behalf of a defendant accused of crime in all cases other than cases of homicide, when there is reason to believe that the witness, from inability, or other cause, will not attend at the trial: *Willard v. Superior Court of Santa Barbara County*, 82 Cal. 456, 22 Pac. 1120.

Section 13, article 1, of the present constitution, is no prohibition upon the power of the legislature to authorize the taking of depositions by the defendant in every class of criminal cases: *People v. Hurtado*, 63 Cal. 288.

#### **Board of Supervisors has no Power Over Rules of Evidence.**

A city ordinance containing certain provisions in relation to the burden of proof, and as to the effect of certain acts as evidence, is void as to those provisions, as the board of supervisors has no power to establish rules of evidence for the guidance of courts: *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747.

### **§ 1824. Proof Defined.**

Proof is the effect of evidence, the establishment of a fact by evidence.

#### *Cross-references:*

Degree of proof required is moral certainty, section 1826, post; order of proof is in discretion of the court, section 2042; material allegations must be proved, section 1867; burden is on each party to prove his own affirmative allegations, section 1870; burden of proof is on party holding the affirmative of

the issue, section 1981; and proof must correspond with the pleadings, section 1868.

See Jones on Evidence, section 3—The terms “evidence” and “proof.”

### § 1825. What the Law of Evidence Embraces.

The law of evidence, which is the subject of this part of the code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining in certain cases, the value and effect of evidence.

#### *Cross-references:*

Subdivision 1. Of what facts the court will take judicial knowledge, section 1875.

Subdivision 2. What are conclusive presumptions, section 1962; what are disputable presumptions, section 1963; presumption conclusive unless controverted, section 1961.

Subdivision 3. Means of production of evidence, sections 1985-1997; manner of production of evidence, sections 2002-2054.

Subdivision 4. Collateral questions must be avoided, section 1868; secondary evidence, when admissible, see section 1830, and cross-references thereunder.

Subdivision 5. The jury are judges of the effect of the evidence, section 2061; effect of presumptions as evidence, sections 1959, 1961; secondary evidence defined, section 1830; what is deemed satisfactory evidence, section 1835; reasonable doubt, section 2061, subdivision 5.

See Jones on Evidence, sections 1-3.

Evidence—Necessity for exclusionary rules, section 1.

Evidence—Definitions of, as used in municipal law, section 2.

The terms of “evidence” and “proof,” section 3.

### § 1826. Degree of Proof Required.

The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

#### *Cross-references:*

Definition of proof, section 1824; satisfactory evidence defined, section 1835; preponderance of evidence necessary, section 2061; in criminal cases proof must be beyond a reasonable doubt, sections 1981 and 2061, subdivision 5.

See Jones on Evidence, section 4—Demonstrative and moral evidence.

#### **Equivalent Instructions.**

The failure of a court to give an instruction as asked in the words of section 1826 of the Code of Civil Procedure is cured by giving an instruction in different words but equivalent in effect: *Treadwell v. Whittier*, 80 Cal. 574, 584.

#### **Degree of Proof Necessary to Verdict.**

The jury are not at liberty to base a verdict of guilty on the “probabilities of the case.” “That de-

gree of proof which produces conviction in an unprejudiced mind'' is required: *People v. O'Brien*, 130 Cal. 1, 8.

#### **Amount of Proof.**

As a general rule, where proof of a fact is required by statute, and the nature or character of the evidence for the purpose is not specified, the only mode of making the proof is that prescribed by the common-law rules of evidence: *Schloss v. His Creditors*, 31 Cal. 201.

Matters of mere inducement do not require strict proof: *Porter v. Gamba*, 43 Cal. 105.

Slight proofs make out *prima facie* case when negative is to be proved. In all such cases, rebuttal is comparatively easy, and is of imperative obligation: *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183.

Defect of proof may be cured by testimony introduced by the adverse party: *Turner v. McIlhaney*, 8 Cal. 575.

#### **Proof of Loss Under Insurance Policy.**

When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time: Civ. Code, sec. 2634.

### **§ 1827. Kinds of Evidence.**

There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

#### *Cross-references:*

Subdivision 1. Of what judicial knowledge will be taken, section 1875.



Subdivision 2. Witnesses defined, section 1878; who may be witnesses, section 1879; who may not be witnesses, section 1880, 1881; privileged communications, section 1882; judge and jury may be witnesses, section 1883.

Subdivision 3. Public writings defined, section 1888; public writings in general, section 1892-1896; private writings in general, sections 1929-1951.

Subdivision 4. When material objects are admissible, section 1954.

See Jones on Evidence, chapter 1—Evidence in general.

### **Knowledge of the Court is Evidence.**

The court takes judicial notice of certain matters which thereby become evidence in a case: *People v. Chee Kee*, 61 Cal. 404.

### **Material Objects.**

“Objects cognizable by the senses,” such as specimens of fruit, are a proper form of evidence: *Thomas Fruit Co. v. Start*, 107 Cal. 206, 209.

## **§ 1828. Degrees of Evidence.**

There are several degrees of evidence:

1. Primary and secondary;
2. Direct and indirect;
3. Prima facie, partial, satisfactory, indispensable, and conclusive. [Amendment approved March 24, 1874; Amendments 1873-74, p. 379. In effect July 1, 1874.]

### *Cross-references:*

Subdivision 1. Primary evidence defined, section 1829; secondary evidence defined, section 1830.

Subdivision 2. Section 1830; direct evidence, section 1831; indirect evidence, section 1832.

Subdivision 3. Prima facie evidence defined, section 1833; partial evidence defined, section 1834; satisfactory evidence, section 1835; indispensable evidence defined, section 1836; conclusive evidence defined, section 1837.

See Jones on Evidence, sections 5-7.

Direct and circumstantial evidence, section 5.

Competent and satisfactory evidence, section 6.

Other descriptive terms, section 7.

### § 1829. Primary Evidence Defined.

Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents. [Amendment approved March 24, 1874; Amendments 1873-74, p. 379. In effect July 1, 1874.]

#### *Cross-references:*

Certificate of purchase or location is primary evidence of ownership, section 1925; prima facie evidence defined, section 1833; secondary evidence defined, section 1830; and see cross-references under sections 1830 and 1833, following.

See Jones on Evidence, section 7—Primary evidence as synonymous with best evidence.

#### **Primary and Prima Facie.**

As the Code of Civil Procedure originally stood, the definition now applied to prima facie evidence was applied to primary evidence. The words "primary evidence" are evidently so used in section 1925, post.

#### **Best Evidence Must be Produced.**

The best evidence the nature of the case is susceptible of must be adduced: *McCann v. Beach*, 2

Cal. 25; *Garwood v. Hastings*, 38 Cal. 217, per *Sprague*, dissenting.

At the hearing of a motion tried on affidavits, if a copy of a deed under the control of the party relying upon it is attached to an affidavit, and the party presenting the affidavit refuses to produce the original deed upon the demand of his adversary, and shows no excuse therefor, the copy of the deed is entitled to no weight as evidence: *Leese v. Clark*, 29 Cal. 665.

A copy of an agreement contained in an indictment is not admissible without first accounting for the loss of the original: *People v. Hust*, 49 Cal. 653.

The object of this rule of law is the prevention of fraud: *Bagley v. McNickle*, 9 Cal. 430.

When the plaintiffs in ejectment rely for title on a Spanish or Mexican grant, and prove a confirmation of the same under the act of 1851, for the settlement of private land claims in California, and it appears that a patent has been issued for the same, the plaintiffs must, if requested, produce the patent in evidence, or their testimony will be stricken out: *Chipley v. Farrus*, 45 Cal. 527.

#### **What is Best Evidence.**

Judicial determination, being matter of record, must be proved by record itself: *Moran v. Abbey*, 63 Cal. 56.

If sale is made in writing, proof of sale must be made by producing the writing, or its loss must be established: *Patterson v. Keystone Min. Co.*, 30 Cal. 360.

Parol evidence cannot be admitted if objected to to show that a written encumbrance exists on real estate: *Racouillat v. Requena*, 36 Cal. 651.

Press copies of letters are best evidence, next to the originals themselves: *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403.

Letter-press copy is inadmissible in evidence until the nonproduction of an original writing has been properly accounted for: *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381.

If it appears that there was agreement in writing respecting the transfer of certain goods, the writing is the best evidence: *Towdy v. Ellis*, 22 Cal. 650.

Copy of notice posted on mining claim to show its extent is not admissible in evidence if the notice itself be obtainable: *Lombardo v. Ferguson*, 15 Cal. 372.

Where original instrument proved to be lost has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for: *Brotherton v. Mart*, 6 Cal. 488.

Oral evidence of transfer of title or interest to land claimed under the possessory act is not admissible: *Buel v. Frazier*, 38 Cal. 693.

Before parol evidence of the contents of a deed is admissible, it must be shown to have been lost or destroyed: *Poorman v. Miller*, 44 Cal. 269.

Oral testimony, if objected to, is not admissible to prove previous conviction of crime of a witness examined in his own behalf, whether adduced on cross-examination of such witness, or given by other witnesses for that purpose, the record being the best evidence of that fact: *People v. Reinhart*, 39 Cal. 449.

If a witness on cross-examination is asked if he was not arrested for vagrancy, an objection that the record is the best evidence is not tenable; for an arrest does not necessarily imply that there was any record: *People v. Manning*, 48 Cal. 335.

Best evidence of alcalde grant is official public record of the acts of the alcalde by whom the grant was made: *Garwood v. Hastings*, 38 Cal. 216.

Where a mining claim is conveyed by a written bill of sale, the bill of sale is the best evidence of the transfer: *Crary v. Campbell*, 24 Cal. 634.

The admission in evidence of the record of a contract creating a lien without proof of the loss of the original, or otherwise accounting for it, was not allowable, prior to the amendment of section 1951 of the Code of Civil Procedure, in 1889, and such evidence could not constitute proper proof of notice: *Fresno Canal and Irr. Co. v. Dunbar*, 80 Cal. 536, 22 Pac. 275.

Where a witness was first sworn on his voir dire, but the referee did not take down what the witness said in his voir dire, in another action in which the witness is a party, the opposite party may prove by the referee what the witness said of his voir dire: *Hobbs v. Duff*, 43 Cal. 485.

A translation of the expediente of a Mexican grant of land, unaccompanied by the original, or a certified copy of the same, is not admissible in evidence: *Bixby v. Bent*, 51 Cal. 590.

Copy of mortgage is not admissible as evidence, where the absence of the original is not accounted for: *Ord v. McKee*, 5 Cal. 515.

Receipts executed by third party, acknowledging payment of money, are but secondary evidence, as the party executing them is a competent witness to prove the payments, or any other person who saw the payments made: *Ford v. Smith*, 5 Cal. 314.

Naturalization can only be proved by production of the judicial record of naturalization, or a properly exemplified copy thereof, or by proof of the loss or destruction of the record: *Prentice v. Miller*, 82 Cal. 570, 23 Pac. 189.

Naturalization must be proved by record evidence, showing the action of the court, and cannot be proved by parol evidence of the party that he is a citizen, or has been naturalized: *Figg v. Hensley*, 52 Cal. 299.

Whether a witness for a corporation was an officer and stockholder may be proven by parol evidence: *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485.

In an action against a private corporation, parol testimony is admissible to show that person was authorized to act as its agent, unless the corporation is compelled by its charter to appoint its agents by deed or resolution: *Carey v. Philadelphia etc. Petroleum Co.*, 33 Cal. 693.

It is competent to prove by reputation the existence and incorporation of a foreign banking company: *People v. Ah Sam*, 41 Cal. 645.

A notarial certificate of presentment and demand, and of protest for nonpayment of a promissory note,

taken from the record of the notary, is admissible, and is prima facie evidence of the facts contained therein in like manner as the original protest: *McFarland v. Pico*, 8 Cal. 626.

The certificate of a notary, stating that he had duly notified all the parties to a promissory note of the protest thereof, by addressing a letter to each of them, and by delivering said letter at his place of business to a person of discretion, having charge thereof, is prima facie evidence of that fact: *Kellogg v. Pacific Box Factory*, 57 Cal. 327.

The certificate of a tax collector, offered to prove payment of taxes, so as to show that there was no abandonment of the possession of the premises, is not evidence, where the tax collector himself can be called as a witness: *Powell's Heirs v. Hendricks*, 3 Cal. 427.

### § 1830. Secondary Evidence Defined.

Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents. [Amendment approved March 24, 1874; Amendments 1873-74, p. 379. In effect July 1, 1874.]

#### *Cross-references:*

Certified copies of records, section 1951; section 1981; subdivision 6; laying foundation for introduction of secondary evidence of writing, sections 1937, 1829, 1855; testimony of a deceased witness, section 1870, subdivision 7; instructions as to secondary evidence, section 2061, subdivisions 6, 7; secondary evidence of contents of writing under statute of frauds is admissible, section 1973; secondary evidence of contents of will, section 1969; and see cross-references under sections above cited; secondary evidence of contents of writing may be given on trial, section

1870, subdivision 14; preliminary questions of admissibility of evidence are addressed to the court, section 2102.

See Jones on Evidence, section 7—Other descriptive terms.

**Secondary Evidence is Admissible, Unless Properly Objected to.**

If party permits his antagonist to prove fact by secondary evidence, he cannot afterward object that it was not proved by the best: *Goode v. Smith*, 13 Cal. 81; *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. 336; *Brady v. Reese*, 51 Cal. 447.

If copy of conveyance is admitted without objection that it is not the best evidence, or that the loss of the original is not shown, it has the same effect as evidence that the original would have had: *Rewrick v. Goldstone*, 48 Cal. 554.

If the objection to the admission of a certified copy of a duly recorded instrument in proof be that the instrument is "not duly certified and proved," it will be held to be a waiver of the objection that the original was not produced, or not shown to be under the control of the party offering the evidence: *Mayo v. Mazeaux*, 38 Cal. 442.

The contents of the original proclamation are sufficiently proved by the testimony of the clerk of the board of supervisors that he drafted the original of which the printed advertisement held in his hand, which was afterward introduced in evidence, is a copy, if such testimony was received without objection: *County of San Luis Obispo v. White*, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

When the evidence of payments by the executors of the will of a decedent, made for the support of the minor children, consists of the evidence of one of the executors, not objected to, who testifies both to the fact of payment and to the contents of the letters acknowledging the receipt of the payment, no error appears in holding that the items of payment thus proven were sufficiently vouched to justify the charges, in the absence of counter-evidence: *Estate of Hilliard*, 83 Cal. 423, 23 Pac. 393.

**Secondary Evidence Received with Caution.**

Secondary evidence must always be received with caution, and then not until every means is shown to have been exhausted in the effort to procure that which is superior: *Norris v. Russell*, 5 Cal. 249; *Bagley v. McMickle*, 9 Cal. 430.

**§ 1831. Direct Evidence Defined.**

Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: If the fact in dispute be an agreement, the evidence of a witness who was present, and witnessed the making of it, is direct.

*Cross-references:*

Direct evidence of one witness sufficient to prove fact, section 1844; witness can testify only as to facts derived from his own perception, section 1845; presumption may be controverted, section 1961; inferences classified, section 1957; inference defined, section 1958; precise fact in dispute may be proven, section 1870, subdivision 1; execution may be proven by one who saw the writing executed, section 1940, subdivision 1.

See *Jones on Evidence*, section 5—Direct and circumstantial evidence.

**§ 1832. Indirect Evidence Defined.**

Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For exam-



ple: A witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

*Cross-references:*

Direct evidence, section 1831; indirect evidence classified, section 1957; inferences defined, section 1958; presumptions defined, section 1959; when inferences arise, section 1960; when presumptions may be controverted, section 1961; conclusive presumptions, section 1962; disputable presumption, section 1963; what admission may be proven, section 1870; instructions as to admission, section 2061, subdivision 4; entries and writings of decedents, section 1946; and see cross-references under section 1831.

See Jones on Evidence, section 5—Direct and circumstantial evidence.

**Indirect Evidence.**

Indirect or circumstantial evidence, to be admissible, must prove some fact from which the fact of dispute may be inferred: *Gardner v. Dennison*, 106 Cal. 190, 193.

**§ 1833. Prima Facie Evidence Defined.**

Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: The certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record. [Amendment approved March 24, 1874; Amendments 1873-74, p. 379. In effect July 1, 1874.]

*Cross-references:*

Primary evidence defined, section 1829; presumptive evidence, section 1963; papers in proceedings to per-

petuate testimony are prima facie evidence, section 2087; writings of decedent are prima facie evidence in certain cases, section 1946; historical works, etc., are prima facie evidence of facts of general notoriety; entry made by officer of board of officers in the course of official duty are prima facie evidence, section 1926; entries in official books are prima facie evidence, section 1920; where question in dispute is obligation or duty of third persons, what constitutes prima facie evidence, section 1851; private writings duly acknowledged, are prima facie evidence, sections 1948, 1951; affidavit of publication is prima facie evidence, section 2011.

See Jones on Evidence, section 7—Other descriptive  
terms.

#### **Matters Specially Made Prima Facie Evidence.**

**Affidavit of Printer of Publication of Notice of Assessment.**—The publication of notice required by this article may be proved by the affidavit of the printer, foreman, or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is prima facie evidence of the time and place of sale, of the quantity and peculiar description of the stock sold, and to whom, and for what price, and of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation, and copies of the same, certified by the secretary thereof, are prima facie evidence of the facts therein stated. Certificates, signed by the secretary, and under the seal of the corporation, are prima facie evidence of the contents thereof: Civ. Code, sec. 348.

**Assessment-book.**—The assessment-book, or delinquent list, or copy thereof, certified by the county auditor showing unpaid taxes against any person or property, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. (Amendment approved March 28, 1895; Stats. 1895, p. 330. In effect immediately.) Pol. Code, 3789.

**Certificate of Election.**—The certificate of election is prima facie evidence of the right to membership. (Amendment approved March 30, 1874; Amendments 1873-74, p. 3. In effect, July 6, 1874.) Pol. Code, 236.

**Certificate of Master.**—A certificate from the master or chief surviving officer of a ship, to the effect that a seaman exerted himself to the utmost to save the ship, cargo, and stores, is presumptive evidence of the fact: Civ. Code, sec. 2059.

**Certificate of Recording Officer.**—“The certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof of fraud”: *Swamp Land District v. Gwynn*, 70 Cal. 566, 570; *Reclamation District v. Wilcox*, 75 Cal. 443, 449.

**Executors' Deeds.**—The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed, in the office of the recorder of the county where the lands lie, and is prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance: Code Civ. Proc., sec. 1601.

**Great Register.**—A certified copy of an uncanceled entry upon the great register is prima facie evidence that the person named in the entry is an elector of the country. (Amendment approved March 30, 1874; Amendments 1873-74, p. 20. In effect July 6, 1874.) Pol. Code, 1117.

**Infant's Age in Indentures.**—The age of every infant so bound shall be inserted in the indentures, and shall be taken to be the true age; and whenever public officers are authorized to execute any indentures, or their consent is required to the validity of the same, it shall be their duty to inform themselves fully of the infant's age: Civ. Code, sec. 270.

**Inventory of Separate Property.**—A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real prop-

erty by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside: Civ. Code, sec. 165.

**Lottery Tickets.**—Upon a trial for the violation of any of the provisions of chapter 9, title 9, part 1, of this code (against lotteries), it is not necessary to prove the existence of any lottery in which any lottery ticket purports to have been issued, or to prove the actual signing of any such ticket or share, of any pretended lottery, nor that any lottery ticket, share, or interest was signed or issued by the authority of any manager, or of any person assuming to have authority as manager; but in all cases proof of the sale, furnishing, bartering, or procuring of any ticket, share or interest therein, or of any instrument purporting to be a ticket, or part or share of any such ticket, is evidence that such share or interest was signed and issued according to the purport thereof: Pen. Code, 1109.

**Militia Records.**—All fines and penalties for non-attendance upon drills, parades, and inspections, legally determined and imposed under the provisions of such rules and by-laws, may be collected by action in justice's court in the name of the people of the state of California; and the books and records of regiments, battalions, and companies, and the proceedings under which delinquents are fined, are prima facie evidence of the facts therein stated: Pol. Code, sec. 1935.

**Notary's Certificate.**—The certificate of a notary showing the presentment to and demand upon the maker for payment, and his refusal to pay, and that notice of such demand and nonpayment was given on the next day by the notary to the indorser, by delivering the same at his residence to a person of discretion in charge, apparently acting for him, is prima facie evidence of the facts stated, and these facts are sufficient to show notice to the indorser of the dishonor of the note: *Fisk v. Miller*, 63 Cal. 367.

**Notice of Copartnership.**—An affidavit of the making of the publication (of a notice of copartnership) made by the printer, publisher, or chief clerk of the

newspaper in which such publication is made, may be filed with the county recorder, with whom the original certificate was filed, and is presumptive evidence of the facts therein stated: Civ. Code, sec. 2484.

**Official Surveys.**—All surveys and maps of boundary lines heretofore legally made and approved, are declared valid, and they are prima facie evidence of the establishment of such lines, except so far as they are inconsistent with the provisions of this code: Pol. Code, sec. 3973.

**Protest.**—The protest of a notary, under his hand and official seal, of a bill of exchange or promissory note, for nonacceptance or nonpayment, stating the presentment for acceptance or payment, and the nonacceptance or nonpayment thereof, the service of notice on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to such bill of exchange or promissory note, and of the party to whom the same was given and the postoffice nearest thereto, is prima facie evidence of the facts contained therein: Pol. Code, sec. 795.

**Record of Copartnership Notice.**—Copies of entries of a county clerk, as herein directed, when certified by him, and affidavits of publication, as herein directed, made by the printer, publisher, or chief clerk of a newspaper, are presumptive evidence of the facts therein stated: Civ. Code, sec. 2471.

**Sheriff's Return.**—The return of the sheriff, upon process or notices, is prima facie evidence of the facts in such return stated. (Amendment approved March 30, 1874; Amendments 1873-74, p. 57. In effect July 6, 1874.) Pol. Code, 4178.

The statute which makes the return of the sheriff upon process prima facie evidence of the facts stated must be held to mean that the return is prima facie evidence when the question under investigation is of such a character as makes that mode of proof appropriate, and cannot be construed as dispensing with the testimony of sworn witnesses upon the trial of an issue which must be proved in the or-

dinary way, and not by a sheriff's certificate: *People v. Lee*, 128 Cal. 330, 60 Pac. 854.

**Tax Sale.**—The collector, as soon as he has made the publication required in sections 3764, 3765, 3766 and 3767, must file with the county recorder and county clerk, respectively, a copy of the publication, with an affidavit attached thereto that it is a true copy of the same; that the publication was made in a newspaper or a supplement thereto, stating its name and place of publication, and the date of each appearance; and in case there was no newspaper published in his county, that notices were put up in three public places in each of the townships, designating the township and places therein, which affidavit is primary evidence of all the facts stated therein: Pol. Code, 3769.

The matters which are recited in the certificate of sale must be recited in the deed, and such deed, duly acknowledged or proved, is primary evidence that:

1. The property was assessed as required by law;
2. The property was equalized as required by law;
3. The taxes were levied in accordance with law;
4. The taxes were not paid;
5. At a proper time and place the property was sold as prescribed by law, and by the proper officer;
6. The property was not redeemed;
7. The person who executed the deed was the proper officer;
8. Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax: Pol. Code, 3786.

The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife. (Amendment approved March 30, 1874; Amendments 1873-74, 193. In effect July 1, 1874.) Civ. Code, sec. 166.

**Prima Facie Evidence—When Conclusive.**

Prima facie evidence is conclusive only in the absence of rebutting evidence: *More v. Hopkins*, 83 Cal. 270, 272.

**§ 1834. Partial Evidence.**

Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: On an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterward connected with the fact in dispute.

*Cross-references:*

Evidence of collateral facts may be given, when, sections 1867, 1868; evidence of facts from which presumptions and inference follow, section 1870, subdivision 15.

See Jones on Evidence, section 6—Competent and satisfactory evidence.

**§ 1835. Satisfactory Evidence Defined.**

That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

*Cross-references:*

Moral certainty required by law, section 1826; preponderance of evidence necessary to secure verdict, section 2061; subdivision 5; effect of introduction of less satisfactory evidence, section 2061, subdivision 7; presumption is satisfactory unless contradicted, section 1963.

See Jones on Evidence, section 6—Competent and satisfactory evidence.

**Slight Evidence.**

Evidence which supports a "mere possibility" that an accident might have been avoided in a certain contingency is but "slight evidence," and is therefore inadmissible: *Brown v. Central Pac. R. R. Co.*, 72 Cal. 523, 527.

**Moral Certainty.**

A possible inference, which does not, however, produce "moral certainty" in an "unprejudiced mind," will not justify a verdict: *Bagnell v. Roche*, 76 Cal. 106, 108.

Each necessary fact to support a cause of action must be shown by evidence which "produces moral certainty or conviction in an unprejudiced mind": *Sharp v. Hoffman*, 79 Cal. 404, 406; *People v. Stewart*, 80 Cal. 129, 132.

**Satisfactory Evidence Necessary to Support a Verdict.**

"Slight evidence" will not support a verdict: *Estate of Carpenter*, 94 Cal. 406, 412.

Evidence falling short of "satisfactory" will not support a verdict: *Mattingly v. Pennie*, 105 Cal. 514, 522; *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 366; *Gustafson v. Stockton etc. R. R. Co.*, 132 Cal. 619, 620; *People v. Williams*, 133 Cal. 165, 166.

"When a matter is proved to the satisfaction of the jury by a preponderance of evidence, then it can be affirmed that they are convinced of its truth, and being thus convinced of its truth, they can base a verdict on it"; *Treadwell v. Whittier*, 80 Cal. 574, 584.

**Satisfactory Proof of Loss or Injury to Freight.**

If freight addressed to a place beyond the usual route of the common carrier who first received it is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor: Civ. Code, sec. 2202.



**§ 1836. Indispensable Evidence Defined.**

Indispensable evidence is that without which a particular fact cannot be proved.

*Cross-references:*

Indispensable evidence in general, section 1967; in cases of perjury and treason, section 1968; of wills, section 1969; of transfer of real property, section 1971; statute of frauds, sections 1973, 1974.

**§ 1837. Conclusive Evidence Defined.**

Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: The record of a court of competent jurisdiction cannot be contradicted by the parties to it.

*Cross-references:*

Conclusive presumptions, section 1962; no evidence conclusive unless so declared, section 1978; judgments and orders, when conclusive, section 1908; recitals in statutes, when conclusive evidence, section 1903.

See Jones on Evidence, section 7—Other descriptive terms.

**Prima Facie Evidence is not Conclusive.**

“Prima facie” evidence is not “conclusive,” for the law permits it to be contradicted: *More v. Hopkins*, 83 Cal. 270, 272.

**Matters Specially Made Conclusive.**

**Tax Deeds.**—Such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed. Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except when the

land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession, accrued as of the date of the deed to the state. (Amendment approved March 28, 1895; Stats. 1895, p. 329. In effect March 28, 1895.) Pol. Code, sec. 3787.

**Actions on Undertakings Against Breach of the Peace.**—In the action, the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence of the breach: Pen. Code, sec. 713.

**Proof of Notice on Application for Letters of Administration.**—An entry in the minutes of the court that required proof was made and notice given upon hearing of an application for letters of administration is conclusive evidence of the fact of such notice: Code Civ. Proc., sec. 1376.

**Proof of Notice of Settlement of Final Account.**—A decree showing that proof of notice of the settlement of a final account was made to the satisfaction of the court is conclusive evidence of that fact: Code Civ. Proc., sec. 1638.

## § 1838. Cumulative Evidence Defined.

Cumulative evidence is additional evidence of the same character to the same point.

### *Cross-references:*

Limitation upon introduction of cumulative evidence is in discretion of the court, section 2044.

See Jones on Evidence, section 7—Other descriptive terms.

### **What is Cumulative Evidence.**

Evidence, to justify a court in rejecting it in an affidavit on motion for a new trial on the ground that it is cumulative must be "additional evidence of the same character to the same point": *Kenezleberger v. Wahl*, 92 Cal. 202, 208.

**§ 1839. Corroborative Evidence Defined.**

Corroborative evidence is additional evidence of a different character, to the same point.

***Cross-references:***

Corroborative evidence necessary to prove perjury and treason, sections 1844, 1968.

## TITLE I.

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*Res inter alios acta*.

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- Record cannot be varied by parol.
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### § 1844. One Witness in General Sufficient.

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

#### *Cross-references;*

Number of witnesses to prove perjury and treason, section 1968; jury not bound to decide in conformity with the declarations with any number of witnesses, section 2061, subdivision 2; number of witnesses to prove lost or destroyed will, see notes and section 1969; what witnesses are entitled to full credit, sections 1879, 1880; who are incompetent, section 1880; privileged communications, section 1881.

See Jones on Evidence, section 902—Number of witnesses.

**One Witness Sufficient.**

Therefore, the exclusion of the testimony of a second witness called to prove what has been testified to already by an uncontradicted witness, is not a prejudicial error: *People v. Westlake*, 62 Cal. 303; *People v. Reed*, 48 Cal. 553.

“The evidence of one witness entitled to full credit is sufficient to prove (a fact). But the evidence of a defendant so situated does not as a matter of legal compulsion command this full credit”: *County of Sonoma v. Stofen*, 125 Cal. 32, 37.

**§ 1845. Witness Must Testify of His Own Knowledge, Except When Opinions, Inferences or Declarations are Admissible.**

A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

*Cross-references:*

Who may be witnesses, section 1879; opinions when admissible, section 1870, subdivision 10; opinions as to handwriting, section 1943; inferences, section 1955 et seq.; declarations, when admissible, section 1962, subdivision 3; section 1870, subdivisions 2-4; declarations of decedents, sections 1852, 1853, 1870, subdivisions 4, 8; declarations when inadmissible, section 1848; declarations in prejudice of title, section 1849; declarations against interest, sections 1849, 1853, 1870, subdivision 5; section 1946, subdivision 1; *res gestae*, sections 1850, 1854; indirect evidence, section 1832; refreshing memory of witness, section 2047.

See *Jones on Evidence*, section 137—Logical connection between fact offered and fact to be proved.

**Hearsay Evidence is in General Inadmissible.**

Evidence of declarations of a third person, tending to discredit the testimony of a witness, is hearsay and inadmissible: *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381.

Testimony relative to what witness heard that defendant said is hearsay, and should be stricken out: *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799.

Declarations of contents of lost instrument made to a witness are hearsay, and should not be received in evidence: *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643.

Upon the trial of a defendant charged with dealing and playing the game of faro, where a witness for the prosecution testified that "he was playing faro," and on cross-examination testified that at the time he saw the defendant playing he did not know what the game was, and that the only knowledge which he afterward acquired on the subject had been gained from what a man told him, a motion by the defendant to strike out his testimony as to what game was being played, upon the ground that it was hearsay, should have been granted: *People v. Gosset*, 93 Cal. 641, 29 Pac. 246.

The admission of hearsay testimony from an officer as to the description of the culprit given him by the prosecuting witness before the arrest of the defendant is prejudicial error: *People v. Johnson*, 91 Cal. 265, 27 Pac. 663.

Newspaper accounts of the killing and of the arrest of the defendant are not competent evidence of any material fact in the case, and are not rendered admissible because they might have tended to corroborate the statements of one of defendant's witnesses upon purely collateral matters called out upon cross-examination, where there was no attempt to impeach the witness upon such points, nor any question made as to the truth of his statements: *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021.

In a criminal prosecution for murder where the defendant claimed an alibi, and the prosecution claimed that the crime was committed before the departure

of a certain train, which contradicted the claim of alibi it is error for the court to permit, the prosecution, against objection, to show by the local agent and the night operator of the railroad that by the rules and regulations of the company the trains must not arrive before their schedule time, the conductor must register the exact time of arrival and departure, and that such register was in fact kept at the station, and to permit the introduction in evidence of the register, where neither of the witnesses had any actual knowledge of the times, nor was the conductor who made the record called as a witness. Such evidence should be excluded as hearsay: *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106.

Declarations which, if made by a third person, would be mere hearsay, are hearsay if made by a wife, as there is no difference in principle between the wife's declarations and those of anyone else: *People v. Simonds*, 19 Cal. 275.

The following question, "Do you know what the general belief was with reference to those mines, as to whether they were abandoned or not?" calls for hearsay evidence: *Phenix etc. Co. v. Lawrence*, 55 Cal. 143.

When the fact that testimony is hearsay for the purpose of showing the insanity appears for the first time on cross-examination the testimony should be stricken out: *People v. Pico*, 62 Cal. 50.

Remarks made a few days before the execution of the will, by the proponent, who was also the principal beneficiary, as to the condition of the testator are objectionable as hearsay: *Estate of Brooks*, 54 Cal. 471.

The general rule is that hearsay evidence is inadmissible: *Sexton v. Sexton*, 56 Cal. 426; *Butler v. Estrella Raisin Vineyard Co.*, 124 Cal. 239, 56 Pac. 1040; *Carroll v. Storck*, 57 Cal. 367.

Verdict of coroner's jury is not admissible to show the time or manner of the death of a husband and wife, who were murdered together. It is a matter of mere opinion and hearsay: *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855.

It is proper upon motion to strike out hearsay evidence: *People v. Kramer*, 117 Cal. 647, 49 Pac. 842.

The testimony of the plaintiff as a witness to a balance of account of which he had no personal knowledge, the figures of which were given to him by an accountant, should be stricken out: *Arnold v. Producer's Fruit Co.*, 128 Cal. 637, 61 Pac. 283.

A party calling a witness cannot get the naked declarations of the witness before the jury as independent evidence: *Estate of Kennedy*, 104 Cal. 429, 38 Pac. 93.

Testimony as to conversations between the owners as to their intention to erase the clause referred to from the contract, held in the absence of the brokers, is hearsay, and incompetent upon the issue as to mutual mistake: *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222.

In a prosecution for crime the declaration of another person that he committed the crime is not admissible. Proof of such declaration is mere hearsay evidence, and is always excluded, whether the party making it be dead or not: *People v. Hall*, 94 Cal. 595, 30 Pac. 7.

#### **Facts not Provable by General Reputation.**

Hearsay evidence as to the general reputation of a person for sobriety is not admissible: *Stevens v. San Francisco etc. R. R. Co.*, 100 Cal. 554, 35 Pac. 165.

The boundary line of a county cannot be proved by evidence showing where it is reputed to run among persons living near the line, except where it is an ancient boundary and depends upon prescription, or cannot be proved except by parol: *Lay v. Neville*, 25 Cal. 545.

The residence of the claimant at the time the declaration was filed is not a fact of any general or public interest, and cannot be proved by evidence of the general understanding and report in the community: *Pfister v. Dascey*, 68 Cal. 572, 10 Pac. 117.

Insanity is not to be proven by general reputation: *People v. Pico*, 62 Cal. 50.

It is error to admit evidence to prove partnership by general reputation: *Sinclair v. Wood*, 3 Cal. 98.

**Hearsay Evidence, When Admissible.**

The testimony of a witness as to her age at a given time is admissible in evidence, although her knowledge is derived solely from statements made to her by members of her family: *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580.

Hearsay information of death of the ancestor of plaintiff derived from the immediate family of the deceased is sufficient, *prima facie*, to establish the fact: *Anderson v. Parker*, 6 Cal. 197.

Where fact sought to be established is, that certain words were spoken, without reference to the truth or falsity of the words whether by a party to the action as an admission of a fact, or to him as a notice, or under such circumstances as to require action or reply from him, the testimony of any person who heard the statement is original evidence and not hearsay: *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

Whenever knowledge of defendant charged with negligence is factor in determining the question of negligence, it may be shown by his own testimony that he received notice of facts which would constitute negligence, and it is no objection that the notice was not given under the sanction of an oath, or that the opposite party had no opportunity of cross-examining the informant, and proof of such notice is not within the rule excluding hearsay: *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

**Inventory of Estate is Hearsay of Facts Stated Therein.**

The inventory and appraisement of an estate are not admissible or competent evidence to prove the facts stated in the inventory: *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

**Warning Witness Against Giving Hearsay Testimony.**

The court may caution a witness not to give hearsay testimony: *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540.



**Opinions, Impressions and Deductions not Generally Admissible.**

The general rule is that opinion evidence is inadmissible: *People v. Ah Own*, 85 Cal. 580, 584.

Opinions of person not an expert are not evidence: *Reynolds v. Jourdan*, 6 Cal. 108.

The opinions of witnesses are generally admissible only when they relate to matters of science or art, or to skill in some particular profession or business: *Hastings v. Steamer United States*, 10 Cal. 341.

Where a witness has testified to the performance of certain acts by another, he cannot give his impressions as to the object the other had in their performance: *Tait v. Hall*, 71 Cal. 149, 12 Pac. 391.

Deduction of conclusions from facts proved is not province of witness, but of a jury; such evidence is purely matter of opinion, and not the statement of a fact, and should be excluded: *Largan v. Central R. R. Co.*, 40 Cal. 272.

In an action for the specific performance of a parcel agreement to convey land questions asked the defendant as to whether he had ever said anything to lead the plaintiff to believe that she was going to obtain title or a deed of the land, or whether he intended to give her more than a life estate, are properly excluded, because asking for a conclusion of the witness: *Burlingame v. Rowland*, 77 Cal. 315, 19 Pac. 525.

Opinion of witness as to meaning of expression used by another person in a conversation between them is not admissible in evidence. It is for the jury to determine the meaning from the relation of the parties, the language employed, and all the surrounding circumstances: *People v. Moan*, 65 Cal. 532, 4 Pac. 545.

The following question was put by the district attorney to a witness for the prosecution: "Then, taking your knowledge of his having been drinking and what you had heard, and his appearance and conduct at the time, the impression made on your mind was simply that he was a drunken man?" Held, the witness should not have been permitted to testify to an impression which might have been produced by what

he had heard any other person than the accused say: *People v. Wreden*, 59 Cal. 392.

The evidence of persons not experts, who testify, without knowledge, as to their opinion of the sufficiency of the construction of a manufactured article, with the manufacture of which they had nothing to do, is not admissible: *Hoult v. Baldwin*, 78 Cal. 410, 20 Pac. 864.

In an action against a partnership, and in order to prove one of the defendants was a partner, it is incompetent to ask a witness whether from what he saw while working for the firm, and from the acts of the particular defendant during that time, he was a partner: *Turner v. McIlhaney*, 8 Cal. 575.

Questions asked, calling not for facts, but for the conclusion of the defendant as a witness, as to what the plaintiff and a third person understood, in reference to the interest of the plaintiff in a prospecting venture, and as to whether the plaintiff expected wages from the defendant, were properly disallowed: *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700.

Whether or not a third person would have seen an object in a particular situation, assumed in a question asked a witness, is not a matter that can be determined by the opinion of the witness: *People v. Worden*, 113 Cal. 569, 45 Pac. 844.

It is not error to strike out answers of a witness as to what he judged from what he saw: *People v. Elliott*, 119-Cal. 593, 51 Pac. 955.

Upon cross-examination of a witness for the prosecution, a question by counsel for the defendant as to what conclusion the witness came to from the manner in which defendant conducted the business, as to whether or not he was the manager and had full control, or otherwise, is properly excluded as incompetent: *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

When the facts from which negligence is sought to be inferred are within the experience of all men of common education, the jury must determine the question of negligence without the aid of experts: *Shafter v. Evans*, 53 Cal. 32.

An expert cannot properly be asked whether a structure is a safe one, or whether certain methods are prudent; but facts may be elicited from the witness from which such a conclusion inevitably follows: *Giraudi v. Electric Imp. Co. of San Jose*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108.

### **Opinions Distinguished for Facts.**

In an action to recover for injuries caused by the overturning of a handcar upon which a passenger was being conveyed upon defendant's road, the testimony of another passenger upon the same trip who was sitting on the rear end of the handcar at the time it was thrown from the track, in answer to a question as to whether, under the circumstances, it was possible for an ordinary person sitting in the position of the plaintiff, to stand the force of the jar and still retain his seat upon the car, does not fall within the rule which excludes the opinion of a witness: *Healy v. Visalia etc. R. R. Co.*, 101 Cal. 585, 36 Pac. 125.

Opinion evidence that a handcar was too narrow for the track, and also as to the appearance of plaintiff immediately after the accident, may be given by witnesses who observed the facts: *Healy v. Visalia etc. R. R. Co.*, 101 Cal. 585, 36 Pac. 125.

In an action to recover for work done and materials furnished in the construction of a sidewalk, where the plaintiff has testified as to the precise work he had agreed to do, and the kind of materials it was agreed should be used in its construction, it is competent for him to state whether in fact the work had been done according to the contract. Such evidence is not within the law excluding the opinions of witnesses, but is a statement of facts within his knowledge: *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109.

### **Opinions of Nonexperts are Admissible in Certain Cases.**

Where a declaration is made in the presence of a third party he may, as a witness, be asked, whether in his opinion the party sought to be charged was within such distance that he might have heard the declaration: *Raymond v. Glover*, 122 Cal. 471, 55 Pac. 298.

A plaintiff, though not an expert, may testify as to the immediate physical consequences of an injury received by him: *Bland v. Southern Pacific R. R. Co.*, 65 Cal. 626, 4 Pac. 672.

A witness, even though not an expert, who details a conversation between himself and another, may also in connection therewith state his opinion, belief or impression, as to the state of mind of such person as it seemed or appeared to the witness at the time of the conversation: *People v. Wreden*, 59 Cal. 392.

The opinion of a witness may be received in connection with his statement of the facts upon which it is based, when the impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, and the judgment or opinion of the witness by whom they have been experienced is the only mode by which they can be presented to a jury: *Healy v. Visalia etc. R. R. Co.*, 101 Cal. 585, 36 Pac. 125.

As a general rule, the opinions of nonexpert witnesses are not admissible in evidence, but they must state facts and not opinions deduced from the facts, leaving to the jury, whose province it is, to draw the proper inference from the facts when stated; but this general rule has exceptions, and the opinions of ordinary witnesses derived from observation are admissible in evidence, when, from the nature of the subject, the facts cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment: *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

In an action against a fraternal organization for the recovery of sick benefits, a question asked a witness who knew the plaintiff quite intimately and saw him frequently and had conversations with him about his health during the period covered by his claim against the defendant, as to whether when he saw the plaintiff he was apparently well, is competent, and the fact that it involves the opinion of a nonexpert witness based upon observation of the apparent health of the plaintiff does not render it inadmissible: *Robinson v. Exempt Fire Co. of San Francisco*, 103 Cal. 1, 42 Am. St. Rep. 93, 36 Pac. 955.

A witness testifying to declarations made by agent in a conversation may give his opinion that the agent of the bank was within such distance that he might have heard the conversation: *Raymond v. Glover*, 122 Cal. 471, 55 Pac. 398.

One who is shown to have had experience in the observation and treatment of gunshot and other wounds on the frontier, against the Indians, and in the territories, although not a medical witness, may be permitted to testify as to the character of a wound found upon the body of the deceased, and the description of the wound by such witness is admissible as the statement of a fact: *People v. Gibson*, 106 Cal. 458, 39 Pac. 864.

A witness who is not expert may testify as to the apparent condition of the defendant as to sobriety at the time of the offense: *People v. Monteith*, 73 Cal. 7, 14 Pac. 373.

Witnesses residing in the county in which the services were rendered by plaintiff, though at a distance from the place where they were rendered, who were in court and heard the evidence of the plaintiff and who were business men of experience and had employed other persons for like services, and who testified that they knew the value of such work in the county, are qualified to testify to the value of the plaintiff's services: *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700.

Where the defendant had testified that he feared an attack from the deceased with a knife, a question upon cross-examination, based upon the fact of distance testified to by him, as to how the deceased could reach him with the lunge of a knife after stepping up two or three feet from a distance of ten or twelve feet, is not objectionable as improperly asking for the opinion of the witness: *People v. Gleason*, 127 Cal. 323, 59 Pac. 592.

Nonprofessional witnesses, though not entitled to express an opinion where the jury, or the court acting as such, are equally capable with the witness of forming an opinion from the facts stated, are allowed to express opinions based on facts within their per-

tention is first called to the particular acts or declarations proposed to be proved, with sufficient minuteness as to time and circumstances: *Silvey v. Hodgdon*, 48 Cal. 185.

Where a witness testified favorably to the defendant, in his examination in chief, it is competent to ask, on cross-examination, whether he had not made statements out of court tending to show his friendly feeling toward the defendant, and whether he had not expressed an intention to suppress facts within his knowledge that would injure defendant's case; and such statements may be proved to impeach the witness if he denies making them: *People v. Murray*, 85 Cal. 350, 24 Pac. 666.

A witness for the prosecution in a case of murder may properly be asked, in his cross-examination, whether he had agreed to be present, and to aid the deceased in the expulsion of the defendant, who committed the homicide while the attempt was being made to expel him from premises claimed by the deceased: *People v. Furtado*, 57 Cal. 345.

It is proper upon cross-examination of the defendant, to lay the foundation for impeachment, by asking him he had not tried to get white witnesses to testify for him in support of an alibi claimed by him: *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453.

Upon cross-examination of witnesses for the prosecution, who have given damaging evidence against a defendant, offers of evidence to show that one of the witnesses had been told of remarks by the accused about his family, and that another witness had said that she would hang the defendant if her evidence would do so, are competent for the obvious purpose of showing bias and ill-feeling on the part of the witnesses against the defendant, and it is error to exclude the offered evidence: *People v. Anderson*, 105 Cal. 32, 38 Pac. 513.

Upon the trial of a defendant accused of murder, the animus of a witness for the prosecution may be tested on cross-examination, and it is error to refuse to allow questions to be answered which would tend to explain the relations of the witness toward the

deceased, and to prove a spite against the defendant for having killed the deceased: *People v. Worthington*, 105 Cal. 166, 38 Pac. 689.

Where a witness for the plaintiff denies on his cross-examination that he offered to procure testimony in the case for the defendant if he paid therefor, the defendant may impeach him by evidence to the contrary: *Lewis v. Steiger*, 68 Cal. 200, 8 Pac. 884.

The rule as to evidence of contradictory statements applies equally to evidence of declarations or acts of hostility or ill-feeling on the part of the witness. There is no distinction between admitting declarations of hostility of the witness, by way of impairing the force of his testimony, and admitting contradictory statements, so far as this rule is concerned: *Baker v. Joseph*, 16 Cal. 173.

On the trial, one of the plaintiffs, when testifying as a witness in his own behalf, was asked on cross-examination if he had not on a certain night gone with shotguns upon the premises in controversy, while the defendants were in the peaceable possession thereof, and forcibly dispossessed them. The court disallowed the question. Held, that the question was proper as tending to show that the witness was biased or entertained ill-will against the defendants, but that its rejection was without prejudice, as the witness had previously admitted entertaining ill-will toward one of the defendants: *Anderson v. Black*, 70 Cal. 226, 11 Pac. 700.

Where a witness has testified to matters material to the issues, the party against whom he has testified may, on cross-examination, show that the witness is hostile to or prejudiced against him, and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses; but this can only be done when the witness has testified to material matters: *Luhrs v. Kelly*, 67 Cal. 289, 7 Pac. 696.

If it is proposed to assail credibility of witness by letter in which hostility is shown to the party against whom he is called, and the letter is shown to the witness, and he denies writing it, the handwriting

may be proved by other witnesses: *Silvey v. Hodgdon*, 48 Cal. 185.

In an action for damages for the diversion of water, where one of the plaintiff's witnesses has testified that he is a member and officer of a water company which pays the expenses of the litigation, it is error to refuse to allow the defendant to ask the witness, on cross-examination, why such company pays the expenses of the litigation. Such question is proper for the purpose of showing the interest, bias, or prejudice of the witness: *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543.

The interest and feeling of a witness are always material elements to be considered by the jury in weighing his testimony; and evidence of statements made by a witness for the defendant, after the killing, tending to show his interest and feeling is competent for that purpose: *People v. Gregory*, 120 Cal. 16, 52 Pac. 41.

The defendant should be permitted to prove that the prosecuting witness had endeavored to persuade one of the sureties on his bail bond to withdraw, as tending to show a degree of hostility and persecuting spirit on the part of the witness, which, in the opinion of the jury, might affect the value of his evidence. The fact that it already appeared that the prosecuting witness was hostile could not supply the place of such proffered testimony: *People v. Bird*, 124 Cal. 32, 56 Pac. 639.

A witness for the defendant may be asked, on cross-examination, if he had not attempted to bribe certain other witnesses to give false testimony in the interest of the defendant, for the purpose of showing his bias and partisanship: *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833.

A witness for plaintiff may be asked on cross-examination if he has not threatened to kill the defendant, for the purpose of showing the degree of his hostility: *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139.

Where a hostile witness has testified to material matters extending over a long period of time, upon



whose testimony the court has based its findings against the appellant, a liberal latitude should have been given to the appellant on cross-examination to test the intelligence, accuracy of memory, disposition to tell the truth, bias, relation to the parties, interest, and motives of the witness and a refusal to allow a reasonable cross-examination of such a witness is ground of reversal: *Estate of Kasson*, 127 Cal. 493, 59 Pac. 950.

It is not error to instruct the jury that the presumption that a witness speaks the truth may be repelled by "his interest in the case, or his bias or prejudice against one of the parties," as well as "by the manner in which he testifies," by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence: *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

When a witness for defendant has impeached plaintiff's general reputation for chastity, and, on cross-examination, testified that he had come from another county to testify against plaintiff, and it is competent and admissible for plaintiff, in rebuttal, to testify that she was not acquainted with the witness. The plaintiff had a right to show that the witness came from a place beyond the reach of a subpoena to voluntarily testify and to show, by express testimony, if she could, that his statement was absolutely false: *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48.

#### **Bias, What May not be Shown.**

A witness for the state, who had been previously prosecuted for killing the father of the defendant on the occasion at which the defendant committed the homicide for which he was being tried, cannot be asked, for the purpose of showing his feeling as a witness, whether, on such previous trial, he had employed counsel to defend himself: *People v. Ryan*, 108 Cal. 581, 41 Pac. 451.

If married women testify as witnesses for the people in a criminal case, the defendant cannot, for the

purpose of affecting their credibility, introduce testimony to prove a conspiracy on the part of their husbands to falsely prosecute him and obtain his property: *People v. Parton*, 49 Cal. 632.

A witness for the defendant, who had merely testified in chief that he knew the defendant, and that defendant had money the day before the alleged robbery, could not properly be asked on cross-examination if he had not once been with the defendant in the county jail in another county. Such evidence is not sufficient to justify an inference of bias: *People v. Lynch*, 122 Cal. 501, 55 Pac. 248.

Where the testimony of a witness for the prosecution, on cross-examination, discloses prejudice against the family of the defendant on account of what was heard about their character, the particular reason for the prejudice is immaterial, and a question as to what the character was which the witness speaks about may be ruled out without prejudicial error: *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

#### **Proof of Contradictory Facts Showing Falsity of Evidence.**

Where witnesses for the prosecution testified that defendant, while in custody, recognized a pistol lying on the table, and stated in English that he thought it was his pistol, evidence is admissible to impeach such witnesses by showing the comparative heights of the table and of the defendant, and that he could not see the pistol on the table, but error in the rejection of such evidence is cured by its subsequent admission; and the fact that a witness for the defendant who testified by way of impeachment that the defendant could not speak English was impeached by the prosecution prior to the admission of the rejected evidence, cannot prevent the cure of the error in rejecting it, and it is not error to refuse to strike out the evidence of defendant's witness, and the impeachment thereof by the prosecution, when the rejected evidence was admitted: *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833.

Upon the trial of a defendant accused of the larceny of a cow, it is error to refuse to allow the de-



fendant to answer a question which would go to the respective credibility of the defendant and of a witness of the prosecution, whose testimony had placed the defendant in the position of having the possession of the stolen cow without accounting for such possession: *People v. Ward*, 105 Cal. 652, 39 Pac. 33.

**§ 1846. Witness Must be Sworn—Witness Must be Examined in Presence of Parties.**

A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

*Cross-references:*

Administration of oaths, section 2093; form of oath, sections 2093-2096; affirmation, section 2097; examination of witnesses, section 2042 et seq.; cross-examination of witnesses, sections 2045, 2046, 2048; cross-examination on taking of deposition, sections 2025, 2032.

See *Jones on Evidence*, section 730—Competency of Witnesses—Oath.

**Rule in Criminal Cases.**

The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf: *Pen. Code*, sec. 865.

**Testimony Taken Ex Parte not Admissible.**

Testimony not taken in the presence of parties interested and having an opportunity to attend is not admissible: *Jones v. Douchow*, 87 Cal. 109, 113.

**§ 1847. Witness Presumed to Speak the Truth—Presumption, How Repelled—Jury Exclusive Judges of Credibility.**

A witness is presumed to speak the truth. This

presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

*Cross-references:*

Presumption of innocence, section 1963, subdivision 1; evidence of good character not admissible until after impeachment, section 2053; *falsus in uno*, section 2061, subdivision 3; party introducing witness not allowed to impeach his character, section 2046; how a witness may be impeached, section 2051; evidence of particular wrongful acts not admissible, section 2051; prior inconsistent statements, section 2052; the jury are exclusive judges of credibility, section 2061, subdivision 2; conviction of felony, section 2051; credibility of parties, beneficiaries, convicts, atheists, etc., section 1879.

See Jones on Evidence, sections 12, 828-836.

Presumption of innocence—Applications of the presumption—Fraud and similar issues, section 12. Witnesses cannot be contradicted as to wholly irrelevant matter—Further illustrations—Reversible error, section 828.

Partiality of witness relevant—On that subject cross-examiner not concluded by answer, sections 829, 830.

Contradicting the witness to prove bias, section 831. Collateral questions—Judicial discretion, sections 832-834.

Questions as to former conviction or indictment, section 834.

Same—Statutes, section 835.

Questions not affecting credibility, but merely tending to prejudice, inadmissible, section 836.

**Credibility of Witnesses—Credibility is Question for Jury.**

It is province of jury to decide on credibility of witnesses: *Wing Chung v. Los Angeles*, 47 Cal. 531; *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Edson*, 68 Cal. 549, 10 Pac. 192; *People v. Dolan*, 93 Cal. 315, 31 Pac. 107.

Where the value and weight of evidence depend upon the credibility of the witnesses, it is a matter peculiarly for the jury to determine: *People v. Cesena*, 90 Cal. 381, 27 Pac. 300.

An instruction "that though the witness was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, the jury were bound to believe his testimony," was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness: *People v. Eckert*, 16 Cal. 110.

An instruction that, "You should carefully determine the amount of credibility to which their evidence is entitled. If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it," is proper: *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201.

An instruction that, "When facts are testified to by witnesses who are not impeached, and there is no inherent improbability in the statement, the jury are bound to take that evidence as proving the particular fact; and the jury have no right capriciously to disregard evidence where it is not controverted and the character of the witnesses is good, and the story is probable," is correct: *Hayward v. Rogers*, 62 Cal. 349.

Statute declaring that when defendant in criminal case becomes witness in his own behalf the credit to be given to his testimony must be left solely to the jury, under instructions of the court, does not establish a new rule for defendants in criminal cases, but simply applies to them a rule which exists as to other witnesses: *People v. Rodondo*, 44 Cal. 538.

It is not proper for the court to instruct the jury that they should bear in mind the relationship or kin-

ship between certain witnesses in behalf of the defense and the defendant, and that the jury may consider whether their position and interest may not affect their credibility: *People v. Shattuck*, 109 Cal. 674, 42 Pac. 315.

An instruction to the jury in a criminal case upon the credibility of witnesses for the defendant, to the effect that, in judging the credibility of witnesses, the jury are to take into consideration the fact that they were near akin or related to the accused, and that they could not be expected to say anything unfavorable to the defendant, is erroneous: *People v. Hertz*, 105 Cal. 660, 39 Pac. 32.

Although room may appear to the court for grave doubts as to the truth of the testimony of a witness, his credibility is question for the jury, and it cannot be held as matter of law that the jury was not warranted from his testimony in concluding that the guilt of the defendant was established beyond a reasonable doubt: *People v. Freeman*, 92 Cal. 359, 28 Pac. 261.

The jury are the exclusive judges of the credibility of witnesses, the weight of testimony, and of the facts established and the presumption of fact deducible from them: *People v. Messersmith*, 61 Cal. 246.

When the defendant, who was examined on his own behalf, and who was the only eye-witness of the transaction, testified to facts which would amount to justification, and it was claimed, he being the only witness, that the evidence did not justify the verdict, it was for the jury to determine how much of the statement of the defendant they should believe and how far it would carry conviction to their minds: *People v. Strange*, 61 Cal. 496.

The jury are the exclusive judges of the credibility of an accomplice, as well as of the other witnesses who testified in the cause: *People v. Gibson*, 53 Cal. 601.

The jury are exclusive judges of the credibility of the prosecutrix: *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

Where certain witnesses were inmates of a low theater, where actresses were employed to serve drinks, attend the boxes, and solicit patronage for the bar, it is error to instruct the jury that as the law allows and licenses such places, "it is submitted whether it is justifiable to charge its inmates with want of veracity, unless accompanied with other proof." It is for the jury to determine whether or not such fact ought to influence them in passing upon the credibility of the witnesses: *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

Evidence of witness who has been impeached may be disregarded by the jury and the court may so instruct: *People v. Phillips*, 70 Cal. 61 11 Pac. 493.

**Where Defendant in Criminal Case Offers Himself as Witness, Jury are Exclusive Judge of His Credibility.**

It is the better practice to refrain from instructing jurors as to the relation of the defendant to the case: *People v. Curry*, 103 Cal. 548, 37 Pac. 503.

An instruction to the jury bearing upon the credibility of a defendant's testimony is not looked upon with favor, and must be limited within the strictest lines: *People v. Hertz*, 105 Cal. 660, 39 Pac. 32.

It is the better practice to give no instruction as to the credibility of the defendant as a witness in his own behalf; although if an instruction is given in general terms as to the credibility of a defendant as a witness, in the form sanctioned in the case of *People v. Cronin*, 34 Cal. 191, and in subsequent cases, it is not ground for reversal; but, when the language used is such as strongly to suggest to the jury that in the case then before them the defendant testified falsely, or to intimate that such is the opinion of the court, the judgment cannot stand; and when the language used by the court in commenting on the testimony of a defendant is materially different from that used in the *Cronin* case, the judgment must be reversed, unless this court can see that the difference has not been prejudicial: *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

**Credibility of Witnesses—Review on Appeal.**

It is the exclusive province of the trial court to pass upon the credibility of the witnesses: *Olivas v. Olivas*, 61 Cal. 382, 386; *Walsworth v. Johnson*, 41 Cal. 61; *Helm v. Martin*, 59 Cal. 57; *Laville v. Oxarart*, 59 Cal. 471.

An order denying a new trial will not be reversed where it appears that the question presented by the motion for a new trial necessarily involved a consideration of the credibility of the witnesses: *People v. Merkle*, 89 Cal. 82, 26 Pac. 642.

Verdict of a jury will not be disturbed when the credibility of witnesses must be passed upon: *People v. Ah Ti*, 9 Cal. 16.

Verdict of a jury will not be reviewed where the jury refuse to give full credit to the testimony of witnesses: *Duell v. Bear River Co.*, 5 Cal. 84.

**Credibility of Witnesses—Remarks of Judge.**

A remark of the judge upon the cross-examination of a witness, upon which it was attempted to show a discrepancy between her testimony at the trial and that given by her at the preliminary examination, that he could not see an discrepancy in the testimony, though improper, is not prejudicial error if there was in fact no discrepancy: *People v. Elliott*, 80 Cal. 296, 22 Pac. 207.

If character of a witness is called in question during a trial, and the judge makes a remark from the bench indorsing his respectability, it is good cause for a reversal of judgment if the testimony of the witness is material: *McMinn v. Whelan*, 27 Cal. 300.

An expression of the judge in allowing the witness to explain his former evidence, "I think the testimony is all right," imports only that the testimony was competent and admissible, and could not be understood by the jury as intimating that, in the opinion of the judge, the witness was telling the truth: *People v. Smith*, 134 Cal. 453, 66 Pac. 669.

**Conviction of Felony.**

Section 1874 of the Code of Civil Procedure, in conjunction with section 2051, permits proof of



the conviction of a felony as a special exception to the rule against evidence of particular wrongful acts to affect a witness' reputation for truth, honesty or integrity: *People v. Amanucas*, 50 Cal. 233, 235.

**Felony—Sufficiency of Impeachment is Question for Jury.**

It is for the jury to determine in all cases even upon proof of the conviction of felony whether a witness has been sufficiently impeached to warrant disregarding his testimony: *People v. McLane*, 60 Cal. 412, 413.

**Power of Impeachment Enlarged by this Section.**

It should be noted that section 1847 of the Code of Civil Procedure greatly enlarged the power of impeaching a witness. Decisions before the date of that section are therefore not in point: *Heath v. Scott*, 65 Cal. 548, 551; *People v. Silva*, 121 Cal. 668, 669.

**Comments of Court on Impeachment of Witness.**

The court should not comment upon the extent to which the testimony of a witness has been impeached. It is the exclusive province of the jury to determine the credit due the testimony of a witness: *People v. Murray*, 86 Cal. 31, 35; *People v. Compton*, 123 Cal. 403, 409; *People v. O'Brien*, 130 Cal. 1, 10.

It is not error to call the attention of the jury to the various ways in which a person's testimony may be impeached, so long as the court instructs them that it is their exclusive province to determine the final weight to be given the testimony: *People v. Amaya*, 134 Cal. 531, 540.

**§ 1848. Res Inter Alios Acta.**

The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot

affect another. [Amendment approved March 24, 1874; Amendments 1873-74, p. 380. In effect July 1, 1874.]

*Cross-references:*

Declarations, when admissible, section 1962, subdivision 3; section 1870, subdivisions 2-4; declarations of decedents, sections 1852, 1853, 1870, subdivision 8; declarations in prejudice of title, section 1849; declarations against interest, sections 1849, 1853, 1870, subdivision 5; section 1946, subdivision 1; declarations of partner, section 1870, subdivision 5; declarations of agent, section 1870, subdivision 5; effect of judgments, section 1911; when parties deemed the same, section 1910; when a surety is bound principal is bound from time of notice, section 1912.

**Declarations Admissible Only in Virtue of a Particular Relation.**

Declarations of third persons are inadmissible unless they have a joint interest with the parties or some legal relation exists between them: *Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326.

The party offering the declarations of third persons must show their admissibility by showing the time and circumstances under which they were made: *Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326.

When a witness for the prosecution has testified to conversations with third persons, which the prosecution fails to connect with the defendant by proposed proof, a motion of the defendant to strike out such conversations should be sustained: *People v. Powell*, 87 Cal. 348, 25 Pac. 481.

Where existence of deed is subject matter in controversy, evidence of the declarations of a person not a party to the action as to its contents is inadmissible: *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381.

Assessment lists of the property deeded to a wife, showing an assessment made to her by the assessor, are not an admission that it was her separate property: *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132.

Statements from the assessor's office not signed by the party against whom they are offered, nor shown to have been made under his direction, or with his knowledge, are not competent evidence against him or parties claiming under him: *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. 521.

The declaration of a codefendant as to other proposed offenses, entirely distinct from the offense in controversy, is inadmissible; and the refusal of the court to strike it out is prejudicial error: *People v. Williams*, 127 Cal. 212, 59 Pac. 581.

Letters written by a defendant to a third person showing that he held the title to certain property in trust are not admissible in his behalf in an action against him by a third person to compel the conveyance of the land in question: *Hausman v. Hausling*, 78 Cal. 283, 20 Pac. 570.

Declarations of relatives of the alleged wife, made after the death of the alleged husband, and not within her hearing, to the effect that she was engaged to be married to him at the time of his death, and offered to show the nonexistence of a marriage between them, relate to past matters, and are no part of the *res gestae*, but are inadmissible hearsay, as against the alleged widow and child of the deceased: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

Where an issue of fact is made as to marriage, in a suit involving homestead, the declarations of the alleged wife to the effect that she is not married are admissible: *Poole v. Gerrard*, 9 Cal. 593.

Admissions of a party to a fraud are evidence against other parties to it: *Mamlock v. White*, 20 Cal. 600.

### **Res Inter Alios Acta.**

In an action for damages the plaintiff should be restricted in his examination of his witnesses in chief to the principal matter in dispute, and it is error to extend it to *res inter alios acta*: *Martinez v. Planel*, 36 Cal. 578.

Ruling of court in excluding letter is correct where it was clearly *res inter alios acta*: *King v. La Grange*, 61 Cal. 221.

**§ 1849. Declarations of Predecessor in Title.**

Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

*Cross-references:*

Evidence may be given of the act or declaration of a deceased person done or made against his interest in respect to his real property, section 1870, subdivision 4; estoppel by recital of predecessor in title, section 1962, subdivision 2.

See Jones on Evidence, section 240—Admissions by those in privity of interest—Grantor and grantee.

**Declarations of Grantor are Admissible Against Grantees.**

The declarations of the grantor are admissible, not only as against himself, but against parties claiming under him. It matters not whether the declarations relate to the limits of the party's own premises, or the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts. If their purport is to restrict his own premises or lessen his own title, they are admissible: *Stanley v. Green*, 12 Cal. 148.

Declarations of a party are always admissible against himself, or those claiming under him, by conveyance made subsequent to the making of the declarations, without reference to the time when or place where they were made: *McFadden v. Wallace*, 38 Cal. 51.

Evidence of the declarations and acts of plaintiff's grantor in relation to the land in controversy before he conveyed to the plaintiff is admissible against the plaintiff: *Seegelken v. Corey*, 93 Cal. 92, 28 Pac. 849.

When one derives title to land from another, the declarations of the grantor in relation to his right, made while holding the title which he transferred,

are admissible in evidence against the grantee: *McFadden v. Ellmaker*, 52 Cal. 348.

In ejectment on the ground of prior possession, in plaintiff's grantor, it is competent for the defendant to show a conversation of such grantor while in possession, tending to explain its character, whether as a claimant in his own adverse right, or as tenant of defendant's grantor: *Phelps v. McGloan*, 42 Cal. 298.

In ejectment, evidence of the declarations of a prior owner of the land as to its boundaries, and of the circumstances under which the declarations were made, is admissible against the party claiming under him: *Austin v. Andrews*, 71 Cal. 98, 16 Pac. 546.

Admissions made by the grantor of plaintiff, while occupying the granted premises, against the title under which plaintiff claims are admissible in evidence against plaintiff: *Bollo v. Navarro*, 33 Cal. 459.

The declarations and acts of a vendor before sale are competent testimony to show a fraudulent intent on his part, in a suit to impeach the sale on the ground of fraud: *Visher v. Webster*, 8 Cal. 109; *Jones v. Morse*, 36 Cal. 205; *Landecker v. Houghtaling*, 7 Cal. 391; *Davis v. Drew*, 58 Cal. 152.

Declarations of predecessor in title are admissible against his successors: *Stanley v. Green*, 12 Cal. 163; *Sneed v. Woodward*, 30 Cal. 434; *Bollo v. Navarro*, 33 Cal. 466; *Phelps v. McGloan*, 42 Cal. 298; *McFadden v. Ellmaker*, 52 Cal. 348; *People v. Blake*, 60 Cal. 497, 503, 510; *Moore v. Jones*, 63 Cal. 12; *Seegelken v. Corey*, 93 Cal. 92, 28 Pac. 849; *Austin v. Andrews*, 71 Cal. 98, 16 Pac. 546; *Williams v. Harter*, 121 Cal. 47, 52, 53 Pac. 405; *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857.

So held on trial of an action to have certain premises declared a public street: *People v. Blake*, 60 Cal. 497.

A disputed boundary line may be established by evidence of the declaration of the grantor of the adverse party: *Sharp v. Blankenship*, 79 Cal. 411, 412.

Declarations of a prior owner as to boundaries are admissible against those claiming under him: *Austin*

*v. Andrews*, 71 Cal. 98, 16 Pac. 546; *Peters v. Garcia*, 110 Cal. 89, 42 Pac. 455.

In a controversy between a husband and the donees of his wife, the declarations of the deceased grantor of the wife that the property was community property, though not made in the presence of the wife, are admissible in evidence as forming a part of the *res gestae*: *Lewis v. Burns*, 106 Cal. 381, 39 Pac. 778.

On the trial of an action to have certain premises declared to be a public street, declarations by predecessors in title of the defendant (before any conveyance by them) to the effect that the premises in controversy were a public street are admissible: *People ex rel. Harris v. Blake*, 60 Cal. 497.

In an action by the grantee against a subsequent purchaser from his grantor of the adjoining land to restrain the latter from obstructing the right of way, the declarations of the grantor relating to the designation of the line of way are admissible: *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879.

Declarations of a party are always admissible against himself, or those claiming under him, by conveyances made subsequent to the making of the declarations, without reference to the time when or the place where they were made: *McFadden v. Wallace*, 38 Cal. 51.

In an action for the specific performance of a written contract for the conveyance of land, evidence as to the declarations of the vendor made subsequent to the date of the contract, as to what land had been sold by him, is inadmissible: *Nicholson v. Tarpey*, 124 Cal. 442, 57 Pac. 457.

Declarations made by the grantor of the defendants while he was in possession of the land upon which the springs were situated, relating to the ownership and right to the use of the water from the springs, and the ditches leading therefrom, are admissible for the plaintiffs against the defendants: *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405.

The declarations and acts of a vendor before sale are competent testimony to show a fraudulent intent

on his part, in a suit to impeach the sale on the ground of fraud: *Visher v. Webster*, 8 Cal. 109.

The declarations of the vendor as to the character of his possession after the sale, and while in the actual possession of the property, are admissible against the vendee: *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857.

The action was brought to restrain the defendant, as road overseer, from opening an alleged public road across the land of the plaintiff. On the trial the defendant introduced in evidence certain declarations of a former owner of the land to the effect that he intended to open the locus in quo as a road. The plaintiff thereupon in rebuttal introduced certain other declarations of the former owner made at about the same time, and while he was having the land surveyed, to the effect that he did not intend to open the road. Held, that the evidence was properly admitted: *Tait v. Hall*, 71 Cal. 149, 12 Pac. 391.

#### **Declarations Must be Against Interest.**

Declarations of a grantor are admissible against parties claiming under him, if the purport of the declarations is to restrict or lessen the grantor's title: *Stanley v. Green*, 12 Cal. 148; *McFadden v. Ellmaker*, 52 Cal. 348; *Bollo v. Navarro*, 33 Cal. 439.

Such declarations as are admissible under section 1849 of the Code of Civil Procedure must be against interest: *Thaxter v. Inglis*, 121 Cal. 593, 594, 54 Pac. 86.

#### **Limitation of Rule.**

The admissions of a predecessor in title cannot go to the extent of making or unmaking title by mere parol testimony: *People v. Blake*, 60 Cal. 497, 510; *Frink v. Roe*, 70 Cal. 296, 313.

#### **But Declarations Must be Made While Former Owner is in Possession.**

Declarations of a grantor are inadmissible, unless made "while holding the title": *Emmons v. Barton*, 109 Cal. 662, 670.

The declarations of a vendor, made after the sale, are not admissible in evidence against his vendee: *Briswalter v. Palomares*, 66 Cal. 259, 5 Pac. 226.

Statements of the deceased husband concerning the title, to the property made after the execution of the conveyance to his wife are inadmissible against the wife; and the fact that the husband was in possession of the real property conveyed at the time of the subsequent declarations does not change the rule: *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303.

During the examination of a witness for the plaintiff in ejectment as to the declarations of one of the parties through whom the defendant claimed title, as to the abandonment of his claim to the land, it is not error to sustain an objection of the defendant to general conversations relating to the land, and to a leading question asked as to whether he said he would not return to the land, and when the witness, in answer to the question as to whether he said anything about the land, and what he said, without objection told what he did say, the ruling could not be prejudicial: *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208.

Declarations of predecessor in title are only admissible against his title, not to strengthen it: *Draper v. Douglass*, 23 Cal. 347; *Fischer v. Bergson*, 49 Cal. 294.

Declarations of former owner received in evidence must be made concerning the property conveyed, and while the declarant still owned it: *Tompkins v. Crane*, 50 Cal. 478.

Clear and unequivocal possession by vendor must be shown to admit declarations of vendor as part of the *res gestae*: *Visher v. Webster*, 13 Cal. 58; *Cohn v. Mulford*, 15 Cal. 50.

Declaration of a vendor concerning the transaction after the sale was made and the property delivered so as to pass the title is, as a general rule, inadmissible, and is never to be received, unless it appears that the vendor's declarations were made while in possession of the property with the knowledge or consent, express or implied, of the vendee: *Cahoon v. Marshall*, 25 Cal. 197.



The declarations of a vendor made after the sale are not admissible in evidence as against the vendee to impeach the sale: *Thomas v. Black*, 84 Cal. 221, 23 Pac. 1037; *Visher v. Webster*, 13 Cal. 58; *Long v. Dollarhide*, 24 Cal. 218; *Garlick v. Bowers*, 66 Cal. 122, 4 Pac. 1138.

Declarations of a grantor made after the execution of a deed impeaching the title conveyed thereby are inadmissible: *Hyde v. Buckner*, 108 Cal. 522, 41 Pac. 416; *Spanagel v. Dellinger*, 38 Cal. 278; *Ord v. Ord*, 99 Cal. 523, 34 Pac. 83; *Kilburn v. Ritchie*, 2 Cal. 148, 56 Am. Dec. 326; *Paige v. O'Neal*, 12 Cal. 496.

The declarations of a vendor made after the sale are not admissible in evidence as against the vendee to impeach the sale: *Thomas v. Black*, 84 Cal. 221, 23 Pac. 1037; *Briswalter v. Palomares*, 66 Cal. 259, 5 Pac. 226; *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402.

The declarations and acts of a grantor, made and done in his own interest months after the delivery of a deed by him, are not admissible as indicating his intentions in delivering the deed, and instruments executed by him thereafter cannot constitute evidence in his favor upon the question of such intention: *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

The declarations of the vendor made after the sale and delivery of the animals and while they were not in his possession, and not uttered in the presence of the vendee, are inadmissible against the vendee: *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110.

The declarations of a tenant in possession of land, those declarations being made at the time of possession, may sometimes be given in evidence as a part of the *res gestae* to qualify the possession, the possession being the transaction which the declarations illustrate. But prior to the introduction of these declarations, it must be proved that the tenant was in possession at the time the proposed declarations were made: *Ellis v. Janes*, 10 Cal. 456.

**Declarations of Grantor Made After Sale not Admissible to Show that Sale was Fraudulent.**

The declarations of the grantor, in a conveyance charged to be fraudulent, made subsequent to its execution, and while the grantee was in possession of the property conveyed and out of his presence, is not admissible in evidence to establish fraud on the part of the grantee or his vendee: *Spanagel v. Dellinger*, 38 Cal. 278.

The declarations of a vendor made after a sale and delivery of personal property are not admissible in evidence to show fraud in the sale: *Hutchings v. Castle*, 48 Cal. 152.

Statements made by a vendor of personal property subsequent to his sale are not admissible to defeat the title of his vendee, either when used as proof of fraud or any other fact in avoidance of the deed: *Cohn v. Mulford*, 15 Cal. 50.

Declarations of the vendor of personal property made after the sale are not admissible in evidence for the purpose of showing a fraudulent intent on his part in making the sale. Such declarations made before the sale are admissible: *Jones v. Morse*, 36 Cal. 205.

The declarations of a vendor made after the sale of the wheat are not admissible for the purpose of proving that the sale was not bona fide: *Paige v. O'Neal*, 12 Cal. 483.

Declarations made by donor of personal property after parting therewith are inadmissible in evidence against the donee, either for the purpose of proving that the gift was fraudulent or otherwise: *Walden v. Purvis*, 73 Cal. 518, 15 Pac. 91.

Statements of a vendor made after sale are not admissible to defeat the title: *Cahoon v. Marshall*, 25 Cal. 197; *Walden v. Purvis*, 73 Cal. 518, 15 Pac. 91; *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110.

The declarations of the attachment debtor made after the sale by him to the plaintiff, to the effect that he made a bill of sale to protect the property against his creditors are inadmissible: *Banning v. Marlean*, 121 Cal. 240, 53 Pac. 692.

**Declarations of Grantor Made Before Sale are Admissible to Show that Sale was Fraudulent.**

But where the vendor of personal property is present when the property is moved by his vendees, the declarations of the vendor as to his object in moving the property, made before the removal is complete, are admissible in evidence as part of the *res gestae*, and for the purpose of throwing light upon the character of the transaction, and enable the jury to determine whether the sale was *bona fide*, or with the express intent to defraud his creditors: *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

**Declarations of Grantor Admissible Only as to Rights Assigned Through Him.**

In an action to restrain the defendants from diverting the waters of a natural watercourse, where the prescriptive right relied on by the defendants was acquired by them through a user adverse to their grantor of the land on which the water was used, the declarations of the latter with reference to the water and to the nature of the use of it by the defendants, are not admissible: *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379.

Oral declarations of the grantors of the plaintiff in an action to quiet title are hearsay and inadmissible against defendants, who do not claim or hold title under the parties who made the declarations: *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 159.

**§ 1850. *Res Gestae*.**

Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.

*Cross-references:*

Entries made in regular course of business, section 1947; surrounding circumstances as evidence to aid construction of contract, section 1860; when part of an act, declaration, etc., is given, the whole may be given, section 1854; inadmissibility of parol evidence to vary written contract, section 1856; evidence of the res gestae may be given on the trial, section 1870, subdivision 7; declarations of decedents in respect to relationship of birth, marriage or death of persons related by blood or marriage to such deceased person, section 1870, subdivision 4; common reputation in cases of pedigree, section 1870, subdivision 11.

See Jones on Evidence, section 236, chapter XI.  
Admissions, confessions—Declarations of a party in his own behalf inadmissible, section 236.  
Res gestae, chapter XI.

**Must be a Specific Transaction.**

That evidence may be admissible as part of the res gestae, there must be some distinct specific transaction to which it may be referred: Estate of James, 124 Cal. 653, 659.

**Declarations in Writing.**

This section applies to declarations and admissions in writing, as well as verbal: McKinley v. Smith, 21 Cal. 374; Aguirre v. Alexander, 58 Cal. 21.

Statements in a declaration of homestead that the property is partly community are admissible as part of the res gestae to the transaction of signing the same; but the wife is not estopped thereafter from asserting the contrary: In re Bauer, 79 Cal. 304, 311.

**What is Admissible as Res Gestae.**

In an action by the creditor of the husband to set aside a deed of gift made by a third person to the wife, on the ground that the land was purchased with the husband's money, and that the deed to the wife was a fraud, evidence of conversation at the time of the creditor sale between the grantor and one who

negotiated the sale are admissible as part of the res gestae: *Tervis v. Hicks*, 41 Cal. 123.

Evidence of acts and declarations of grantee in regard to a deed while it was in her actual possession were admissible upon the question of her acceptance of it: *Kidder v. Stevens*, 60 Cal. 414.

Where a defendant is charged with the robbery of one man only, who was robbed while riding with another person, who was also robbed, evidence of the prosecuting witness, whom the defendant was accused of robbing, after stating how he was made to give up his watch and money, that the robber turned his attention then to the person riding with him, and pointed his gun at him, and that the gun was a pistol, is admissible as part of the res gestae: *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006.

It has been held that the declarations of a tenant in possession of land, those declarations being made at the time of possession, may be given in evidence as a part of the res gestae to qualify the possession, the possession being the transaction which the declarations illustrate: *Ellis v. Janes*, 10 Cal. 456.

Statements of warehouse-keeper as to ownership of wheat removed from the warehouse identifying the wheat removed, and made at the time of its removal, are admissible in evidence as part of the res gestae: *Garoutte v. Williamson*, 108 Cal. 135, 41 Pac. 35, 413.

In an action for injury to one attempting to escape anticipated injury, it is error to exclude evidence of the actions of other passengers who remained in the car, and as to whether or not any of them were injured. Such evidence is competent, as a part of the res gestae, to show what they deemed prudent conduct: *Mitchell v. Southern Pacific R. R. Co.*, 87 Cal. 62, 25 Pac. 245.

In an action involving the right to and extent of a water privilege claimed by plaintiffs under an alleged appropriation of a paper purporting to be a copy of the original locating notice that was posted at the point of diversion, and about the time the work was commenced, and whose position was such that it must

probably have been seen by all, is admissible as part of the res gestae: *McKinney v. Smith*, 21 Cal. 374.

In an action for a death, where it appeared that the deceased had been caught under a wheel of one of the cars, and was still under the wheel, held there firmly by the weight of the car, at the time of making the declaration sought to be proved, it is error to refuse to permit questions to be asked as to what he said while in that condition and what he said as to the cause of the accident: *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 Pac. 56.

Evidence of accused's manner and conduct when arrested is admissible: *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347.

Where the issue was fraudulent transfer of property, evidence of declarations of the owner while on a journey to the place whence the fraudulent transfer was to be consummated, in regard to such transfer, are relevant, and form a part of the fraudulent transaction: *Davis v. Drew*, 58 Cal. 152.

In an action for assault, etc., the language used by defendant at the time of the assault may be proved as part of the res gestae for the purpose of showing malice, but not to prove special damage unless it is alleged: *MacDougall v. Maguire*, 35 Cal. 278, 95 Am. Dec. 98.

So it is permissible to show that the wounded man, in a trial for assault, pointed to the accused, and told witness to arrest him, and that accused thereupon ran away: *People v. Lock Wing*, 61 Cal. 80.

That deceased, shortly after infliction of the wound, pointed to the accused, said he did it, and there was no cause for it: *People v. Abbott*, 4 West Coast Rep. 132.

Evidence of condition of body of deceased is admissible as part of res gestae: *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597.

In a prosecution for an assault with intent to commit mayhem, evidence showing a threat or attempt by the defendant to assault the prosecuting witness with a gun which formed part of the same transaction

in which the offense charged was committed, is admissible as part of the *res gestae*: *People v. Demasters*, 109 Cal. 607, 42 Pac. 236.

The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence: *Tait v. Hall*, 71 Cal. 149, 12 Pac. 391.

Evidence is admissible of the appearance of the prosecutrix an hour after the commission of the alleged rape: *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

On a trial for an assault with intent to commit murder, evidence of a conversation between the parties immediately after the assault, which is, perhaps, a portion of the *res gestae*, is admissible: *People v. Swenson*, 49 Cal. 388.

On a trial for an assault with intent to commit murder, evidence of a conversation between the parties, immediately after the assault, which is, perhaps, a portion of the *res gestae*, is admissible: *People v. Swenson*, 49 Cal. 388.

Declarations by a grantee that the purchase money is the separate property of his wife, made to the grantor at the time of the purchase, are a part of the *res gestae*: *Moore v. Jones*, 63 Cal. 12, 16.

Plaintiff's declarations at the time of the accident, that he did not blame anybody on the boat, are admissible in behalf of the owners of the boat in an action against them for damages: *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981.

Evidence of the acts and declarations of the grantee in regard to the deed, while it was in her actual possession, are admissible upon the question of her acceptance of it: *Kidder v. Stevens*, 60 Cal. 414.

So declarations of a husband at the time a deed of land was executed to his wife, that the purchase money was her separate property, are admissible as part of the *res gestae*: *Moore v. Jones*, 63 Cal. 12.

Bloody clothing worn by deceased at the time of the homicide, is admissible as part of the *res gestae*: *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Maj-*

ors, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597; and evidence of the condition of the body.

Evidence of the commission of another crime, contemporaneously with the one for which the defendant is being prosecuted, is admissible as part of the *res gestae*, where both crimes are part of the same transaction: *People v. Teixeira*, 123 Cal. 297, 55 Pac. 988; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236; *People v. Ching Bing Quong*, 79 Cal. 553, 21 Pac. 951.

Evidence of conversations between those present at the time of the commission of the alleged crime: *People v. Roach*, 17 Cal. 297.

And between the parties immediately afterward: *People v. Swenson*, 49 Cal. 388.

Pursuit and capture may be shown: *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944.

Evidence of extent of injuries received by accused is admissible under plea of self-defense: *People v. Hall*, 57 Cal. 569.

The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence: *Tait v. Hall*, 71 Cal. 149, 12 Pac. 391.

Acts of deceased person under a contract, and declarations at the time, as part of the *res gestae*: *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

The declaration of deceased made at the time of procuring his weapon was part of the *res gestae*, and illustrative of the transaction; that it showed the purpose for which the weapon was procured, and that this purpose was an item of proof upon the question which of the two parties first assaulted, this being the point to which the testimony was offered: *People v. Arnold*, 15 Cal. 476.

Testimony is admissible to show the fact that the child complained to his mother of what was done by the defendant, but not as to what he said: *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

Evidence for defendants that the arrest of the son of plaintiff had been the subject of discussion be-



tween plaintiff and her daughter, prior to the trespass, is admissible as tending to show the plaintiff's state of mind at the time of the trespass, which was a circumstance proper to be considered in determining the cause of her fright at the time of the trespass: *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56.

On a trial for an assault with intent to commit murder, evidence of a conversation between the parties, immediately after the assault, which is, perhaps, a portion of the *res gestae*, is admissible; but it is important, and should influence the jury only in case the evidence with respect to the assault itself is conflicting, and if such conversation is erroneously ruled out by the court, the judgment will not be disturbed if the bill of exceptions fails to show conflict: *People v. Swenson*, 49 Cal. 388.

Communications from one alleged conspirator to the other while the conspiracy was in progress and relating to its subject matter was part of the *res gestae* and admissible: *Zellerbach v. Allenberg*, 99 Cal. 57, 73.

#### **Declarations Must Spring from the Circumstances.**

A declaration, to be admissible as part of the *res gestae*, must be an undersigned part or incident of the occurrence in question, and must be a natural and spontaneous outgrowth of the main occurrence. It must exclude the notion of deliberation, or calculation, or design to make evidence for future purposes; and if it be a narrative of past events, it is inadmissible hearsay, and must be excluded: *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 Pac. 56; *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115.

Declarations which were voluntarily and spontaneously made, springing out of the principal transaction, and tending to explain it, and were made at a time so near to, although not precisely concurrent with, it, as to preclude the idea of deliberate design, are to be regarded as contemporaneous with it, and are admissible in evidence as part of the *res gestae*: *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49.

In determination of what acts or declarations are part of *res gestae*, each must be considered upon its

own peculiar facts. The distinguishing feature is that the declarations or acts should be necessary incidents of the litigated act, in the sense that they are part of the immediate concomitants or conditions of such act, and not produced by the calculated policy of the actors. It is not permissible to introduce, under the guise of *res gestae*, a narrative of past events, made after the events are closed, or a declaration which is not the fact, talking through the party, but the party's talk about the facts: *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115.

Upon the trial of a defendant accused of murder, a conversation between the mother of the deceased, and the deceased, more than three days before the homicide, after he had received a letter from the defendant, which conversation did not occur at the time of the receipt of the letter, and had no reference to it, is not part of the *res gestae*, and is purely hearsay, and inadmissible: *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315.

Where two transactions are so blended as to be substantially one declaration, the surrounding circumstances, and statements of the parties at both times, are admissible: *Harris v. Harris*, 67 Cal. 456, 8 Pac. 8.

The declarations are not required to be precisely concurrent in point of time, with the principal fact, if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design: *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49.

#### **What is not Admissible as *Res Gestae*.**

In an action of slander in charging plaintiff with being interested in the larceny of certain cattle, where the plaintiff testified that he paid a certain amount to the owner of the cattle stolen, evidence of a suit to recover such amount, brought against the thief, after the cattle were stolen, and the thief was arrested, is inadmissible, as the transaction was no part of the *res gestae*: *Barkley v. Copeland*, 86 Cal. 483, 25 Pac. 1.

Declarations of a testator, made to his executor just before his death, and more than five years after the date of the will, as to what was intended by the will, and who wrote it, constitute no part of the res gestae, and are not admissible in evidence: *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655.

Expressions of the deceased as to his testamentary intentions, though admissible to prove a friendly feeling toward the persons in regard to whom they are used, yet do not tend to prove that a will conforming to such expressions was procured through undue influence, unless made so near the time of the execution of the will as to constitute a part of the res gestae; and where the testator is, beyond question, of sound mind, they are entitled to no weight at all in the absence of proof of influence as to the very testamentary act: *Estate of McDevitt*, 95 Cal. 17, 30 Pac. 101.

The declaration of a voter, who is proved to have been disqualified, as to how he voted, made in the form of an affidavit before a notary public, is no part of the res gestae: *Lauer v. Estes*, 120 Cal. 652, 53 Pac. 262.

Declarations of the deceased, in a prosecution for manslaughter, made before the meeting with the accused, to the effect that he did not intend to assault accused, are not admissible: *People v. Carlton*, 57 Cal. 83, 40 Am. Rep. 112.

Nor his declarations made half an hour after the shooting, as to what he intended to do with accused: *People v. Westlake*, 62 Cal. 303.

In an action for goods sold, when the issue made is whether the credit was given to the defendant, who obtained the goods, or to another person, the declarations of the vendor made to such other person after the transaction has been completed, and some time has elapsed, are not a part of the res gestae, and are not admissible in evidence on behalf of the plaintiff: *Whitney v. Durkin*, 48 Cal. 462.

Declarations of a testator made to his executor just before his death, and more than five years after the date of the will, as to what was intended by the will, and who wrote it, constitute no part

of the *res gestae*, and are not admissible in evidence: *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655.

The declaration of the deceased made to third parties, after the accident, constituting no part of the *res gestae*: *Hedge v. Williams*, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

In an action to recover damages for injuries caused by a collision, the declarations of the employees of the defendant, made soon after the injury, and not as part of the *res gestae*, but by way of narrative, and of explanation and accounting for the injury, so as to throw blame upon the defendant for not having furnished proper appliances, is not admissible: *Williams v. Southern Pacific Co.*, 133 Cal. 550, 65 Pac. 1100.

#### **Transactions Must be Contemporaneous.**

Admissions must be contemporaneous with the act to which they are intended, to give character: *Aguirre v. Alexander*, 58 Cal. 21, 26; *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418.

A declaration made after the transaction is closed, and some time has elapsed, is not a part of the *res gestae*: *Whitney v. Durkin*, 48 Cal. 462.

Upon the trial of a defendant accused of murder, a conversation between the mother of the deceased and the deceased, more than three days before the homicide, after he had received a letter from the defendant, which conversation did not occur at the time of the receipt of the letter, and had no reference to it, is not part of the *res gestae*, and is purely hearsay, and inadmissible: *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315.

Evidence is not admissible to show that several days after the alleged offense a loaded pistol was taken from the defendant by the relatives of the prosecutrix; nor is such pistol admissible in evidence as an exhibit: *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

The admission in evidence of a statement by the person alleged to have been assaulted, made without the presence of the defendant, and about two hours

after the assault, to the effect that he was shot, without indicating by whom the shot was fired, is not prejudicial to the defendant, if the latter admits when testifying, in his own behalf, to have fired the shot complained of: *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503.

Expressions of a deceased person, as to his testamentary intentions, though admissible to prove a friendly feeling toward the persons in regard to whom they were used, yet do not tend to prove that a will conforming to such expressions was procured through undue influence, unless made so near the time of the execution of the will as to constitute a part of the *res gestae*: *Estate of McDevitt*, 95 Cal. 17, 30 Pac. 101.

Declarations of a testator, made to his executor just before his death, and more than five years after the date of the will, as to what was intended by the will, and who wrote it, constitute no part of the *res gestae*, and are not admissible in evidence: *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655.

Declarations of the deceased, in a prosecution for manslaughter, made before the meeting with the accused, to the effect that he did not intend to assault accused, are not admissible: *People v. Carlton*, 57 Cal. 83, 40 Am. Rep. 112.

Nor his declarations made half an hour after the shooting, as to what he intended to do with accused: *People v. Westlake*, 62 Cal. 303.

#### **Declarations Admissible to Show Intent.**

In a controversy between a husband and the donees of his wife concerning lots which were conveyed to the wife by an employer of the husband and wife, who built houses upon the lots, and who was dead at the time of the trial, the declaration of the grantor in corroboration of the plaintiff's testimony that the property was community property at the time of the purchase of the lots, and when he was building the houses thereon, and as to the character in which the purchases were made, and the terms and conditions upon which he was building the houses, though not

made in the presence of the wife, are admissible in evidence as illustrative of his intent, and as forming a part of the *res gestae*: *Lewis v. Burns*, 106 Cal. 381, 39 Pac. 778.

Although the administrator of a deceased person cannot be permitted to prove the mere declarations of the decedent, he is entitled to prove his acts under the contract sued upon, and any declarations made at the time, and characterizing those acts as a part of the *res gestae*: *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

Declarations made by a person while on a journey explanatory of his motive in making the same are admissible as part of the *res gestae*: *Davis v. Drew*, 58 Cal. 152, 158.

#### **Declarations of an Employee After an Accident.**

The declaration of the captain of the vessel when examining the broken rope after the accident, that "that looks pretty bad," is not admissible as part of the *res gestae*: *Silveira v. Iversen*, 128 Cal. 187, 60 Pac. 687.

In an action for an injury received from the fall of an elevator, owing to the alleged negligence of the defendant, evidence of a conversation had by plaintiff with the person in charge of the elevator after it had stopped in its fall, in which, in response to a question as to what had happened, he declared that "he lost all control, and the connection cord got broke," is competent, the declaration being in its nature a narrative of a past occurrence, and no part of the *res gestae*: *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688.

In an action against a railroad company to recover damages for personal injuries alleged to have been caused by the negligence of an engineer, in the management of a train, on the road of the defendant, the declarations of the engineer, in explanation of the accident, made about five minutes after its occurrence, are not part of the *res gestae*, and are inadmissible in evidence: *Durkee v. Central Pac. R. Co.*, 69 Cal. 533, 58 Am. Rep. 562, 11 Pac. 130.

**Declarations of Injured Persons as to Sufferings.**

Involuntary declarations and exclamations indicative of a present physical condition are competent evidence, as distinguished from objectionable declarations, only amounting to the statement of a past condition: *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. 747.

The statements made by the deceased in regard to his sufferings are admissible to indicate his bodily condition, and the extent of his injury; and the question whether they were feigned or not must be left to the jury: *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139.

**§ 1851. Evidence of Duty or Obligation of Third Persons.**

And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties. [Amendment approved March 24, 1874; Amendments 1873-74, p. 380. In effect July 1, 1874.]

**Declarations of Public Officer.**

In an action against the sureties of an auditor the *res gestae* declarations of the auditor are evidence against the sureties: *Butte County v. Morgan*, 76 Cal. 1, 5.

**§ 1852. Declarations of Decedent as to Pedigree.**

The declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common

reputation, in cases where, on questions of pedigree, such reputation is admissible.

*Cross-references:*

Declarations of decedents as to pedigree, section 1870, subdivision 4; common reputation as to pedigree, section 1870, subdivision 11; entries of decedents against interest, section 1946; declarations of decedent against interest in respect to real property, section 1870; subdivision 4; family Bibles, etc., as evidence of pedigree, section 1870, subdivision 13.

See Jones on Evidence, sections 316-322.

Declarations as to pedigree—Reason for the exception, section 316.

Same—Declarant's relationship—How proved—Particular facts, section 317.

Are the declarations limited to cases where pedigree is the direct subject of the suit? section 318.

Acts and conduct of relatives admissible as well as declarations—Written declarations, section 319.

Same—Family recognition of writings and records, section 320.

Weight of such testimony, section 321.

Declarations only admissible after death of the declarant, section 322.

**Declarations of Deceased as to Pedigree.**

Declarations made by the testator in his will are competent evidence after his death, tending to prove his marriage, and the legitimacy of his children, in a case where the persons so declared, his wife and children, are the devisees: *Pearson v. Pearson*, 46 Cal. 609.

Declarations in a will that certain devisees are the wife and children of the deceased are sufficient to prove those facts, even though there are living witnesses that might be called: *Pearson v. Pearson*, 46 Cal. 609.

The declarations of the deceased brother of the testator are admissible upon the question of heirship of his estate, arising upon distribution thereof, where



there is other evidence to connect the declarant with the family of the testator, regardless of whether the rule of the common law requiring such other evidence has or has not been changed by sections 1852 and 1870 of the Code of Civil Procedure: *Estate of Williams*, 128 Cal. 552, 79 Am. St. Rep. 67, 61 Pac. 670.

Declarations made by a testator in his will are competent evidence, after his death, to prove his marriage, and the legitimacy of his children, in a case where the persons so declared his wife and children are the devisees: *Pearson v. Pearson*, 46 Cal. 610.

Where the relation of the declarant is clearly established, his declarations may freely come in: *Estate of Williams*, 128 Cal. 549, 554.

Where proof aliunde has been given of membership in the family of the deceased, evidence of the declarations of the deceased, as to the facts of paternity and illegitimacy of the daughter, are admissible as evidence of those facts, under section 1852 of the Code of Civil Procedure: *Estate of Heaton*, 135 Cal. 385, 67 Pac. 321.

#### **Where not Admissible.**

The rule as to the admissibility of declarations upon matters of family pedigree and kindred subjects cannot be invoked, where the parties making the declarations are neither deceased nor beyond the jurisdiction of the court: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

A declaration on a question of pedigree must come from a member of the family involved to prove that the declarant is not a member of such family; his declarations are not admissible, for out of his own mouth he removes his qualifications: *Estate of James*, 124 Cal. 653, 661.

Declarations made after the majority of the daughter are admissible on the question of paternity, but not to prove or constitute the public acknowledgment required to be made when she was a minor: *Estate of Heaton*, 135 Cal. 385, 67 Pac. 321.

Paternity cannot be proved by general reputation; and it was error to admit proof that, according to

the general reputation in the community where she resided, the respondent was the daughter of the deceased person claimed as her father. It is only the common reputation in the family, and not the common reputation in the community, that is admissible on questions of pedigree: *Estate of Heaton*, 135 Cal. 385, 67 Pac. 321.

### § 1853. Declaration of Decedent Against Interest.

The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

#### *Cross-references:*

Entries of decedents as declarations against interest, section 1946; see cross-references under sections 1845, 1848, 1849, 1850; declarations in prejudice of title, section 1849; act or declaration of a deceased person done or made against his interest in respect to real property may be proven on trial, section 1870, subdivision 4.

See *Jones on Evidence*, sections 327-333.

Declarations of deceased persons against interest—

In general, section 327.

Sufficient if the entries are prima facie against interest, section 328.

Same—Evidence of collateral facts, section 329.

Rule when the declaration is made by an agent, section 330.

Declarant need not have actual knowledge of the transaction, section 331.

Such declarations inadmissible to prove contracts, section 332.

General rules on the subject, section 333.

**Declarations Must be Against Interest.**

Declaration of person, since deceased, not against, but in support of, his own interest, are not admissible in evidence in favor of those who claim rights which the declarations would maintain: *Poorman v. Miller*, 44 Cal. 269.

The administrator of an estate, who brings an action against one claiming land adversely to the estate, to quiet the title thereto, and to obtain a conveyance thereof to the estate, cannot introduce in evidence the declarations of his intestate, made during his lifetime, to strengthen his own claim of title: *Fischer v. Bergson*, 49 Cal. 294.

Declarations of the deceased in his own favor are not admissible: *Yore v. Borth*, 10 Cal. 238, 52 Am. St. Rep. 81, 42 Pac. 808; *Estate of Welch*, 110 Cal. 605, 42 Pac. 1089.

The fact must appear that the declaration was against interest: *Sill v. Reese*, 47 Cal. 342.

Evidence, to be admissible under section 1853 of the Code of Civil Procedure, must be a declaration against the interest of the declarant: *Thaxter v. Inglis*, 121 Cal. 593, 594.

**When Admissible.**

Declarations of decedent, the former husband of the plaintiff in ejectment, that the land, the subject matter of the action, which had been conveyed to the plaintiff by a third person as a deed of gift, but really for money, was held in trust for the defendant who had advanced the money, are admissible, though made after the execution of the deed: *Wormouth v. Johnson*, 58 Cal. 621.

In an action to cancel a deed made by a son just before his death, to his father, and to quiet the title of the son's estate to the lands purporting to be conveyed thereby, where one of the issues was whether or not the son had acquired these lands by a previous conveyance from his father, without consideration, statements by the son at the time as to the consideration were admissible: *Harris v. Harris*, 67 Cal. 455, 8 Pac. 8.

**When not Admissible.**

Declarations of a deceased, not long before the death, as to his physical condition, and that he was a widower, are not *res gestae*, nor admissible to show nonmarriage to an alleged wife: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

Declarations of relatives of an alleged wife, made after the death of the alleged husband, and not within her hearing, that she was engaged to be married to him at the time of his death, and offered to show that there was no marriage, are no part of the *res gestae*, and not admissible as against the alleged widow and child of the deceased: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

The statements of one who claims a lot of land, made to a stranger, after it has been taken possession of by one who claims adversely to him, are not admissible in evidence in favor of his heirs in an action brought by them to recover possession of the same: *Rice v. Cunningham*, 29 Cal. 492.

Declarations by the plaintiff's intestate, the maker of the instrument, after he had executed the same, held inadmissible to prove such misrepresentation or mistake: *Stephenson v. Hawkins*, 67 Cal. 106, 7 Pac. 198.

Evidence of declarations made by the deceased in respect to the value of his estate, and that he had a large sum of money in his house, is not admissible against the administrator, to prove the ownership or possession of the money: *Estate of Welch*, 110 Cal. 605, 42 Pac. 1089.

**Declarations of Deceased to Show Deed a Mortgage.**

If against interest, declarations of a decedent are admissible to show that a deed absolute on its face was intended at the time as a mortgage: *Harp v. Harp*, 136 Cal. 421, 424.

**§ 1854. When Part of Act is Given in Evidence,  
Whole Must be Given.**

When part of an act, declaration, conversation,

or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.

*Cross-references:*

Manner of cross-examination, section 2048; right of opposite party to see document offered in evidence, section 2047; declarations of third parties in general, section 1870, subdivision 3.

**Where Part of Conversation or Document is Given,  
Whole is Admissible.**

If one party reads portion of written document in evidence in his behalf, the other party is entitled to the reading of the remaining portions thereof, before the intervention of other testimony: *Spanagel v. Dellinger*, 38 Cal. 278.

If plaintiff, during trial, draws out one of his witnesses part of conversation between the plaintiff and another person, the defendant is entitled to prove by his witnesses the whole conversation: *Gillam v. Sigman*, 29 Cal. 637.

Where a witness, on his examination in chief, testifies to part of a conversation had by him at a certain time and place, the entire conversation is admissible in evidence on cross-examination: *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811.

When witness from one party has read extract from testimony given by him in a previous judicial proceeding, the adverse party may introduce in evidence the whole of such testimony: *Hobart v. Tyrrell*, 68 Cal. 12, 8 Pac. 525.

Where the defendants introduce a part of the written testimony of a witness, which has been taken

upon the preliminary examination, it is not error for the court to allow the prosecution to introduce a preceding part of such testimony, substantially upon the same subject, and explanatory and illustrative of the part introduced by the defendants: *People v. Arthur*, 93 Cal. 536, 29 Pac. 126.

Where the prosecution proves declarations and conversations of the defendant in a criminal case, he has the right, on cross-examination, to question the witness as to all he said at the time, and has also a right to call on his defense witnesses to prove all that was said at the time: *People v. Strong*, 30 Cal. 151.

Whole conversation should be taken together: *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

Where a part only of a conversation is heard by a witness, the rule that he must give all that was said applies only to so much as he heard, and if what he heard is intelligible, and pertinent to the case, the prosecution is entitled to prove it: *People v. Daniels*, 105 Cal. 262, 38 Pac. 720.

A conversation between a person indicted for murder, and his victim, while alive, held partly in Chinese, and partly in English, may be proved, that part of it held in English, by persons present who understood English only, and that part of it held in Chinese by persons present who understood Chinese, provided that both the accused and his victim understood both languages: *People v. Ah Wee*, 48 Cal. 236.

Upon the cross-examination of the prosecuting witness, the defendants drew out that the witness had consulted one S. in relation to the transaction out of which the indictment grew, and in part developed what had occurred between them. Held, that the plaintiff was entitled to call out all that took place between the witness and S. in the consultation referred to: *People v. Smallman*, 55 Cal. 185.

Where a particular section of the laws of a foreign state is read as evidence from a printed volume of the statutes of that state, the court, for the purpose of determining what is the law of that state, is not confined to the particular section, but may examine the entire volume: *Ex parte Spears*, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608.

A letter written by the agents of a board of underwriters, of which the defendant was a member, from the place of sale of the cargo to the board of underwriters, in answer to a telegram sent to the agents at the instance of the defendant, is admissible in evidence against the defendant, and no part thereof can be stricken out as being not responsive to the telegram: *Meyer v. Great Western Ins. Co.*, 104 Cal. 381, 38 Pac. 82.

If a witness on behalf of plaintiff is erroneously permitted to testify to a part only of a conversation of defendant, and defendant testifies to the remainder, the error does not prejudice defendant: *People v. Keith*, 50 Cal. 137.

Where part of act or writing is admitted—whole is admissible: *People v. Navis*, 3 Cal. 106; *Chenery v. Palmer*, 5 Cal. 133; *Bradley v. Gardner*, 10 Cal. 371; *Ingoldsby v. Juan*, 12 Cal. 564; *Lawrence v. Fulton*, 19 Cal. 689; *Neuval v. Cowell*, 36 Cal. 648; *Hicks v. Coleman*, 25 Cal. 128; 85 Am. Dec. 103; *Rice v. Cunningham*, 29 Cal. 497.

#### **Remainder Must be Relevant.**

The rule that upon cross-examination the whole of a conversation may be brought out in regard to which there has been any evidence in chief, does not authorize a party whose witness is testifying in chief to ask the witness to state the whole of a conversation, which may involve a mass of matter not relevant: *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

The rule does not extend to receiving the whole of what was said by the party making the admission, but only such other or further part of what was said as would, in any way, explain or qualify the part first given in evidence: *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269.

Where, upon the cross-examination of the plaintiff as to the value of the stock of a corporation, a portion of his verified complaint in another cause, consisting of his allegation of its value, was offered in evidence, it is not error to refuse, upon re-examination, to admit the entire complaint in evidence, or any imma-

terial matter therein, not relating to the question of value: *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328.

Where part only of a conversation has been testified to on cross-examination, it is incompetent to prove the residue thereon on re-examination, where it appears that the residue does not relate to the same subject inquired into on cross-examination, and was not necessary to make it understood: *People v. Altmeyer*, 135 Cal. 80, 66 Pac. 974.

### § 1855. Original Writing Must be Produced.

There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute;

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.



In the cases mentioned in subdivisions 3 and 4, a copy of the original or of the record must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents. [Amendment approved March 24, 1874; Amendments 1873-74, p. 380. In effect July 1, 1874.]

*Cross-references:*

Original writing must be produced or accounted for, section 1937.

Subdivision 1. Will must be produced or loss shown, section 1969; written instrument is best evidence of its existence and contents, section 1829.

Subdivision 2. Notice to produce, sections 1938, 1939.

Subdivision 3. Certified copies of public writings, when admissible, section 1893; proof of judicial record, section 1905; proof of official record of foreign country, section 1907; proof of official documents, section 1918.

Subdivision 4. Public records of private writings, section 1919; preliminary questions of admissibility are addressed to the court, section 2102.

See Jones on Evidence, sections 211-216, 228.

Subdivision 1.

Proof of lost instrument, section 211.

Same—Diligence necessary before secondary evidence is allowed, section 212.

Same—Further illustrations, section 213.

Same—Cases illustrating what is sufficiency of proof, section 214.

Importance of documents as affecting diligence—Time of search, section 215.

Mode of proving loss—Hearsay admissions—Affidavit, section 216.

Proof of the contents of lost documents, section 228.

**Subdivision 2, sections 218-225.**

Effect of notice to produce, section 218.

Object of notice to produce—Time of giving, section 219.

Illustrations of sufficient notice, section 220.

Requisites of notice, section 221.

Notice to produce—On whom served, section 222.

Effect of nonproduction, section 223.

When notice to produce is not necessary, section 224.

When notice to produce is not necessary—Same, continued, sections 224-225.

**Subdivision 3, section 204.**

Appointment and acts of public officers—Writings not producible, etc., section 204.

**Subdivision 4, sections 531-533.**

Recording acts—Conveyances—Documents recorded, when admissible, section 531.

Same—Requisites—Certificates of acknowledgment—Defects in, section 532.

Defective records—Evidence for some purpose, section 533.

**Lost Instruments—How Proven.**

In case of a lost instrument the contents may be proved either by a copy or by oral evidence: *Dyer v. Hudson*, 65 Cal. 372, 373.

Testimony as to a lost deed must be directed to its contents, not to the general transaction—for instance a statement that the land has been sold; the latter is a mere conclusion of law by the witness: *Nicholson v. Tarpey*, 124, 442, 446.

**Lost Instruments—Laying Foundation.**

To admit evidence as to the contents of lost instruments the proper foundation must be laid, namely, proof of loss: *Byrne v. Byrne*, 113 Cal. 294, 299.

**Notice and Possession Must be Proved.**

Possession by the adverse party and notice to him must be proven as a foundation prior to the introduction of oral evidence of writings alleged to be in his possession: *Nicholson v. Tarpey*, 89 Cal. 617, 621.

**Notice not Necessary Where Writing is Notice.**

“It is not necessary to give notice to the opposite party to produce a writing which is itself a notice” in order to entitle one to prove its contents: *Gethun v. Walker*, 59 Cal. 502, 506.

**Certified Copy of Legislative Journals.**

Certified copy of the journals of the legislature may be introduced in evidence: *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 495.

**Certified Copies of Recorded Papers.**

Certified copy of recorded papers may be introduced in evidence: *People v. Hager*, 52 Cal. 171, 186; *Gethun v. Walker*, 59 Cal. 502, 506.

**Preliminary Proof of Recording.**

Preliminary proof of recording is always necessary to the admission of a certified copy under this subsection: *Brown v. Griffith*, 70 Cal. 14, 16.

**Proof of Corporate Resolution.**

Unrecorded resolutions of the board of directors of the corporation the rough minutes of which had been lost, may be proved by parol evidence without reference to what may have been the contents of the lost memorandum: *Boggs v. Lakeport A. P. Assn.*, 111 Cal. 354, 43 Pac. 1106.

It is the duly authenticated record in the books of the corporation, which is the best evidence, and the rough notes of the meetings are as much secondary evidence as the testimony of witnesses, and, in the absence of an authenticated record, any competent secondary evidence may be admitted to show what the act of the board was: *Boggs v. Lakeport A. P. Assn.*, 111 Cal. 354, 43 Pac. 1106.

In an action to foreclose a mortgage against a corporation, a certified copy of a resolution of its board of directors duly attested by the signatures of the president and secretary, under the corporate seal, showing a ratification of the mortgage in suit by authority of the board of directors, is admissible in evi-

dence, as being presumptively the act of the corporation, and it is not necessary to produce the record of such resolution, nor to show that no record thereof had been kept; and in the absence of any counter-vailing proof, the recitals of such certified copy are binding upon the corporation: *Purser v. Eagle Lake L. etc. Co.*, 111 Cal. 139, 43 Pac. 1106.

If the secretary of a corporation, by mistake, omits to enter minutes of the acts of the board, or such entries are postponed by the corporation, the acts may be proved by parol: *Bay View Assn. v. Williams*, 50 Cal. 353.

#### **Parol Evidence to Add to Record.**

Parol evidence is admissible to prove facts omitted from the record, unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence: *Gordon v. San Diego*, 108 Cal. 264, 41 Pac. 301.

Showing the original verdict of a coroner's jury to a witness in a criminal case, and asking the witness if he had signed the verdict, is not an effort to prove the contents of a written record by parol: *People v. Donovan*, 43 Cal. 102.

#### **Expert Summary of Books of Account.**

In an action for dissolution of a copartnership and an accounting, when the books of the firm have been kept in such manner as to be unintelligible, and in view of that fact a stipulation is entered into by the attorneys, allowing the referee appointed by the court to employ experts to reduce the accounts of the firm into a tangible form, the books prepared by the experts are admissible in evidence in connection with the report of the referee, for the purpose of enabling the court to comprehend the accounts: *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16.

In an action for a settlement of partnership accounts, a statement of accounts between the partners, made by an expert in bookkeeping, was offered in evidence by the plaintiff, and it appeared by the testimony of the witness that the books had been altered by him by the direction of the plaintiff after the dis-

solution. Held, that if this had been the only evidence of the correctness of the statement, it would have been inadmissible in evidence, for the plaintiff had no right to alter the books, and then use them as evidence in support of his case; but held, further, there being sufficient evidence aliunde to show the correctness of the data from which the statement was made, that it was properly admitted; and held, further, the evidence being conflicting on the point, that the findings would not be disturbed: *Butler v. Beech*, 55 Cal. 28.

Schedules presented by an expert book accountant in connection with his testimony that they were a correct summarization of what the books showed, from which appeared shortages and defalcations to the amount sued for, are admissible, subject to cross-examination as to the items composing the schedules, and to judicial examination as to their accuracy: *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.

Bank-books and records of the board of supervisors are examples of writings which are too voluminous to produce in court. Their contents may be testified to by a deputy or a clerk who is familiar with them: *Jacobs v. Ludemann*, 137 Cal. 174, 176; *People v. Dole*, 122 Cal. 486, 497.

#### **Excluding Evidence of Account for Failure to Furnish Bill of Particulars.**

It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general or is defective in any particular: *Code Civ. Proc.*, sec. 454.

#### **§ 1856. Parol Evidence to Vary Writing.**

When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore

there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term "agreement" includes deeds and wills, as well as contracts between parties.

*Cross-references:*

Parol evidence of usage, section 1870, subdivision 12; accounting for alterations, section 1892; parol evidence of surrounding circumstances, section 1860; rule as to parol evidence does not apply to recital of consideration, section 1962, subdivision 2; parties are bound by recitals in written instruments, section 1962, subdivision 2.

See Jones on Evidence, chapter XV.

Parol evidence to explain writings, chapter XV.

Subdivision 1, section 442.

As to mistakes of fact—Reformation of contract, section 442.

Subdivision 2, sections 440, 441, 433, 460, 479, 481, 478.

The rule does not prevent proof of fraud—Sealed and unsealed instruments, section 440.

Illegality of contract may be shown—Incapacity, section 441.

What the memorandum is to contain, section 433.

Such evidence only received when the language is of doubtful import, section 460.

Parol proof of latent ambiguities, section 479.

Parol evidence not allowed in case of patent ambiguities, section 480.

Patent ambiguity—How ascertained—Inaccuracies, section 481.

Parol evidence as to execution and delivery, section 478.

### **General Rule that Written Agreement Cannot be Varied by Parol.**

Evidence of a parol agreement to change the time for the payment of rent from that stated in the lease is inadmissible. The written lease can only be altered by a contract in writing, or by an executed oral agreement: *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88.

Parol evidence is inadmissible to vary the terms of a written contract: *Lennard v. Vischer*, 2 Cal. 37; *Miller v. Butterfield*, 79 Cal. 62, 21 Pac. 543; *Guy v. Bibend*, 41 Cal. 325; *Ward v. McNaughton*, 43 Cal. 159.

Parol evidence is inadmissible to vary the terms of a written contract so as to make it embrace property not described therein: *Osborn v. Hendrickson*, 7 Cal. 282.

In the absence of any ambiguity on the face of the contract parol evidence is inadmissible for the purpose of varying its terms or of altering the liability created by it: *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Peabody v. Phelps*, 9 Cal. 288; *Donahue v. McNulty*, 24 Cal. 416, 85 Am. Dec. 78.

In an action at law parol evidence is not admissible to contradict or vary the terms of a written contract. The instrument can be reformed or corrected so as to express the intention of the parties only by a court of equity in a proper action instituted for that purpose: *Irving v. Cunningham*, 66 Cal. 15, 4 Pac. 766.

In an action by a cestui que trust against a trustee to enforce the trust, by compelling a conveyance of  
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the legal title to the cestui que trust, parol evidence, in the absence of fraud or mistake in making the deed will not be received on behalf of the trustee to contradict the language of the deed, and not the cestui que trust, was the beneficiary: *Young v. America Engine Co. No. 6 v. Sacramento*, 47 Cal. 594.

Where an absolute deed has been delivered to the grantee, the title becomes vested free from any conditions, and its operation cannot be defeated by parol proof of an intention on the part of the grantor known to the grantee that it should not take effect in event of the grantor's death; nor is parol evidence admissible to show that the delivery of the deed to the grantee was subject to any condition not expressed therein: *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17.

Where a contract for the sale of merchandise is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence is inadmissible to show a sale by sample: *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

The maker upon the face of a promissory note, with whatever motive or purpose he may sign it, is bound by the contract which he signs, according to the legal effect and meaning of the words. He cannot vary that meaning by parol: *Aud v. Magruder*, 10 Cal. 282; *Kritzer v. Mills*, 9 Cal. 23.

Contract of indorser cannot be changed from a conditional to an absolute one by parol evidence of a verbal promise made by the indorser at the time of the indorsement to pay the note without demand or notice: *Goldman v. Davis*, 23 Cal. 256.

Where a bond against waste, following the description of a mortgage and complaint, described the land as "lot 264 of the lands of the Riverside Land and Irrigation Company," there being, in fact, no such lot, parol evidence to prove that another parcel of land, known as "lot 264 of the lands of the Southern California Association," had suffered waste at the hands of the defendants who gave the bond, and that the latter description of the land was correct, and



the former erroneous, is not admissible, and is properly excluded by the court: *Ogden v. Davis*, 116 Cal. 32, 47 Pac. 772.

Oral evidence, which has the effect to add to and vary the terms of a written agreement, which was the consideration for a note, by proving a contract to sell other and different property from that described in the agreement, is not admissible in an action on the note: *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764.

Parol evidence is inadmissible to show that a bond purporting to be the obligation of individuals was the bond of a corporation: *Richardson v. Scott River etc. Co.*, 22 Cal. 155.

A parol agreement by a mortgagor to pay the taxes, though invalid in itself, cannot be proved under subsection 2 of section 1856 of the Code of Civil Procedure to invalidate the written mortgage: *Daw v. Niles*, 104 Cal. 106, 109.

In an action for the specific performance of a written contract for the conveyance of real estate evidence as to the negotiations and conversations preceding the execution of the written contract is inadmissible: *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101.

#### **General Rule that All Conversations are Merged in the Written Agreement.**

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument: Civ. Code, sec. 1625.

The rule is that the written contract is considered the definite agreement of the parties, and parol conversations and understandings are all merged in it: *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529.

When parties reduce their agreement to writing the writing supersedes all other understandings or agreements between the parties on that subject: *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217.

All the oral negotiations and agreements concerning the exchange of lands are merged in the deeds and mortgages given in pursuance of such negotiations; and evidence of prior negotiations contradicting the terms of such instruments is inadmissible: *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773.

When the terms of an agreement have been reduced to writing by the parties it is to be considered as containing all those terms, and as between the parties there can be no other evidence of the terms of the agreement: *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773.

If a writing contains such language as imports a complete legal obligation it is to be presumed that the parties have introduced into it every material item and term; and parol evidence is inadmissible to add another term to the agreement, although the writing contains nothing on the particular term to which the parol evidence is directed: *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

When there is a written agreement for the sale of personal property containing the terms and conditions of a complete contract, it will be presumed to express all the terms of the agreement between the parties, and parol evidence is inadmissible to show the existence of a warranty not expressed in the contract: *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625.

If oral testimony is received as to a contract, etc., which it afterward appears was reduced to writing, such testimony should be stricken out: *Crary v. Campbell*, 24 Cal. 636.

#### **Classes of Instruments Coming Within the Rule.**

Deed cannot be varied, qualified, or explained by declarations which amount to no more than a mere narrative of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period: *Aguirre v. Alexander*, 58 Cal. 21, 26.

Parol testimony of the officer who executes a deed is not admissible for the purpose of adding to, contradicting, or altering the terms of the deed: *Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78.

Parol evidence as to what was intended by a bill of sale, or what was included in it, is not admissible to contradict or add to the writing: *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243.

Parol evidence is inadmissible to prove that the omission of the testator to provide in his will for any of his children, or for the issue of any of the deceased children, was intentional, and the face of the will itself can only be looked to to determine his intention: *Estate of Salmon*, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030.

A draft of a chattel mortgage prepared by the plaintiff's to be executed by the original defendant, but not executed, is not a written instrument within the rule that oral testimony is not admissible to vary its meaning; but its statements coming from the plaintiff's were merely admissions on their part which were subject to explanation, equally with like verbal admissions: *Wise v. Collins*, 121 Cal. 147, 53 Pac. 640.

The rule that when a contract has been reduced to writing parol evidence is not admissible for the purpose of cutting down or adding to its terms does not apply to a mere memorandum which does not of itself import any contract, but is only intended as an informal memorandum to be considered in connection with previous oral negotiations. In order for the rule to have any application the writing must be one which by legal construction shows upon its face that it was intended to express the whole contract between the parties: *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109.

Parol evidence is not admissible to contradict a map referred to in a deed under which the plaintiff claims, and to fix the location of the premises in controversy in another quarter section than that in which they are located on such map: *Chapman v. Polack*, 70 Cal. 487, 11 Pac. 764.

#### **What is a Contract Within the Rule.**

If a contract is drawn up in duplicate and signed by one party, and the other takes both copies and returns them the next day without signing either, and

declines to sign unless a new provision is inserted, the contract does not bind either party: *Masten v. Grifing*, 33 Cal. 112.

But where the consideration for the defendants' covenants was performed by the plaintiff by the conveyance to them of his interest in a mine, while on their part the consideration for such conveyance was still to be rendered and performed, it was held a contract, though executory: *Luckhart v. Ogden*, 30 Cal. 554; *Colton v. Seavey*, 22 Cal. 501.

If sureties on an official bond sign with an express understanding with the principal in the bond that certain other persons shall sign as sureties, and that unless such other persons sign it shall not be delivered, a delivery of the bond to the obligee without the signature of such other persons does not render it invalid as to the sureties who do sign: *Tidball v. Halley*, 48 Cal. 610.

If one party furnishes another money, and takes a note with the understanding that the borrower shall procure third parties to assign to himself liens on land claimed by the payee, and hold them for the benefit of the payee, the agreement does not contradict or vary the terms of the note, but is an accord and satisfaction of it, and after it has been performed is payment: *Treadwell v. Himmelmann*, 50 Cal. 10.

In an action by a cestui que trust against a trustee to enforce the trust, parol evidence, in the absence of fraud or mistake in making the deed, will not be received on behalf of the trustee to show that the trustee named in the deed will not be received on behalf of the trustee to show that the trustee named in the deed, and not the cestui que trust, was the beneficiary: *Engine Co. No. 6 v. Sacramento*, 47 Cal. 594.

Parol evidence may be received to contradict a receipt as to its mere recitals of fact; it is not an agreement: *Bleven v. Freer*, 10 Cal. 176; *Hawley v. Bader*, 15 Cal. 46; *Simmons v. Cullahan*, 75 Cal. 508, 17 Pac. 543; *Comptoir d'Escompte v. Bresbach*, 78 Cal. 15, 20 Pac. 28; *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429.

**Parol Evidence of Waiver or Subsequent Modification, Abandonment or Novation.**

An oral change in or waiver of the terms of a written agreement must be clearly established: *Lassing v. Paige*, 51 Cal. 575.

When written contract is uncertain in its terms, parol evidence of a subsequent agreement between the parties making such terms definite is admissible: *Katz v. Bedford*, 77 Cal. 319, 19 Pac. 523.

In suit brought on quantum meruit, for work and labor, testimony is admissible to prove that the original contract has been changed at the request of the defendants, and the value of the extra work performed: *Mowry v. Starbuck*, 4 Cal. 274.

It is competent to show by parol that former written contract was canceled as between the parties, and has no longer any existence, and to show an oral agreement for the substitution of a new written contract that was fully executed by the substitution, which is, in effect, to prove a novation: *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786.

Parol evidence is admissible to establish new and distinct agreement upon a new consideration, when it is to be a substitute for the old written agreement: *Adler v. Friedman*, 16 Cal. 138.

Parol evidence is admissible to show that a subsequent written contract, which it is claimed superseded and annulled a prior written contract upon which the action is based, had been executed upon the consideration and agreement that the prior contract should be canceled, and all claims of the plaintiff against the defendant thereunder waived: *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786.

It is competent to show that an oral agreement was the consideration upon which the new written contract was executed, the instrument being itself silent upon the subject of its consideration: *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786.

Waiver and discharge of written contract may be proved by parol: *Adler v. Friedman*, 16 Cal. 140, 76 Am. Dec. 507; *Mills v. Beard*, 19 Cal. 162; *Wangen-*

heim v. Graham, 39 Cal. 174; Luckhart v. Ogden, 30 Cal. 547.

When complaint in action on contract to pay for labor furnished did not count upon a written contract alone, evidence of a verbal contract is admissible in support of allegation that defendants agreed to pay the plaintiff the price of labor furnished, and the fact that a written agreement is proved does not preclude evidence of a verbal promise in support of the allegation: Chew Farng v. Keefer, 103 Cal. 46, 36 Pac. 1032.

#### **Contemporaneous Parol Agreements.**

Where written contract for payment of money is silent as to time for the payment, it is competent to prove by parol evidence that a period or event had been orally agreed upon between the parties at which payment should be made: Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571.

Proof of a collateral parol agreement, or of any independent fact which is not inconsistent with or does not qualify any of the terms of a written contract, is always admissible, even though it may relate to the same subject matter: Guidery v. Green, 95 Cal. 630, 30 Pac. 786.

Evidence of a contemporaneous oral agreement between the parties to a mortgage that the mortgagors should pay the taxes on the mortgage and mortgage debt—which agreement is rendered unlawful by section 5, article 13, of the constitution—is inadmissible for the purpose of invalidating the written stipulation for interest contained in the note and mortgage: Daw v. Niles, 104 Cal. 106, 37 Pac. 876.

Parol evidence is inadmissible in support of a claim by tenant that there was a contemporaneous oral agreement outside of his lease, that he might remove buildings: Jungerman v. Bovee, 19 Cal. 364.

A signature, "R. T. C., Trustee," to a note was held not sufficient to allow proof of an oral agreement that the signer was not to be personally liable, but that the payment was to be made out of a trust fund of which he was trustee: Conner v. Clark, 12 Cal. 170, 73 Am. Dec. 529.

The fact that one of the cograntees in an alcalde's grant, before the proceedings to vest title were completed, appeared before the alcalde and requested it to be made to the other cograntee may be shown by parol testimony, provided the alcalde has made such modification of the grant by an indorsement thereon: *Lick v. Diaz*, 37 Cal. 437.

A written agreement cannot be limited or qualified by oral testimony that the liability of one of the parties thereto was contingent upon some prior condition not expressed therein: *Long v. Saufley*, 89 Cal. 437, 26 Pac. 902.

The plaintiffs were partners who had failed in business and whose entire firm assets had been purchased by the defendant, one of their creditors. On the 21st of April, 1879, they entered into a written contract with the defendant whereby it placed them in charge of the property purchased, as its agents, and agreed to turn over the same to them, being paid in full for all indebtedness, present or future, due it from them. The action was brought to recover damages for a breach of the contract, caused by the refusal of the defendant to turn over the property. On the trial, the court admitted parol evidence to show that a certain debt due from the plaintiffs to the defendant, at the time of the execution of the contract, was not intended to be included therein. Held, that the evidence was inadmissible: *Swain v. Grangers' Union*, 69 Cal. 186, 10 Pac. 404.

#### **Parol Evidence to Show Intent of Instrument.**

Goods stored in a warehouse are sufficiently levied upon under a writ of attachment by taking actual possession of them and placing them in charge of a keeper, and the return of the officer may be aided by parol evidence showing that he remained in possession of the goods by his keeper: *Sinsheimer v. Whitely*, 111 Cal. 378, 52 Am. St. Rep. 782, 43 Pac. 1109.

Oral evidence is sometimes admissible to explain, but not to contradict or vary, the terms of a written contract; thus, if the words of contract be ambiguous, its meaning may be gathered from contemporaneous

facts which intrinsic testimony establishes: *Brannan v. Mesick*, 10 Cal. 95.

Where meaning of written instrument is doubtful, extrinsic evidence may be resorted to for the removal of the doubt, but such evidence is not admissible to show that the effect of the instrument is different from that which its terms plainly and unequivocally denote: *Richardson v. Scott River etc. Co.*, 22 Cal. 150.

Where a written agreement is set out in full in a pleading, the meaning of words or abbreviations therein may be proved on the trial, for the purpose of enabling the court to interpret the words, and the oral evidence as to their meaning need not be stated in the pleading, nor do abbreviations contained in the contract render the pleading liable to special demurrer: *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

Where an ambiguity in an instrument of writing consists in the use of a word which has a settled meaning, but at the same time consistently admits of two interpretations, according to the subject matter in the contemplation of the contracting parties, it is not such a patent ambiguity as falls within the rule forbidding its explanation by parol testimony. It belongs to that intermediate class of cases which partake of the nature both of patent and latent ambiguities: *Jenny Lind Co. v. Bower*, 11 Cal. 194.

Parol evidence is admissible to explain the meaning of particular expressions used in a deed, where they do not convey a definite meaning without such explanation: *Reamer v. Nesmith*, 34 Cal. 624.

In an action to recover the value of certain marble sold and delivered under a contract requiring it to be "finished and ready for setting" in a particular building, parol evidence of the meaning of that expression as used by marble-cutters is admissible: *Myers v. Tibbals*, 72 Cal. 278, 13 Pac. 695.

Conflicting oral evidence given in relation to the way in which the agreement was intended to be or was understood, or interpreted to the parties to it, cannot affect it: *Chung Kee v. Davidson*, 102 Cal. 188, 36 Pac. 519.



Where terms of writing are unambiguous, a witness cannot testify to his understanding of its meaning: *Donohoe v. Mariposa etc. Co.*, 66 Cal. 317, 5 Pac. 495.

Parol evidence of prior conversations between the parties as to their understanding of its meaning is inadmissible: *Bryan v. Idaho Quartz Min. Co.*, 73 Cal. 249, 44 Pac. 859.

Where the writing is lost, evidence of the intention of the parties in making it is inadmissible in the absence of fraud or mistake: *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101.

### **Contradicting Consideration.**

Section 1856 of the Code of Civil Procedure does not preclude a party to a written agreement from contradicting a recital of consideration therein: *Cohen v. Goux*, 48 Cal. 97, 99.

### **Parol Evidence to Change Date.**

Proof that a record was not made on the day it was dated does not contradict it: *Gately v. Irvine*, 51 Cal. 172.

Parol evidence is permissible to show that a promissory note was delivered at a date other than that which it bears on its face: *Paige v. Carter*, 64 Cal. 489, 2 Pac. 260.

### **Parol Evidence to Explain Extrinsic Ambiguity.**

A latent ambiguity occasioned by the coloring of a map may be explained away by parol, the doubt being as to which color was intended to designate the lots selected for school purposes: *Board of Education v. Keenan*, 55 Cal. 642.

So, also, parol evidence was properly admitted to show that in the locality where the deed in question was executed, it was customary to run lines by the magnetic meridian: *Jenny Lind Co. v. Bower*, 11 Cal. 195.

Where the language of a contract is fairly susceptible of either one or two interpretations, without doing violence to its usual and ordinary import, the ambiguity may be explained by extrinsic evidence: *Balfour v. Fresno etc. Co.*, 109 Cal. 221, 41 Pac. 876.

Uncertainties as to the subject matter in a deed may be cleared up by parol: *Darby v. Arrowhead H. S. H. Co.*, 97 Cal. 384, 387; *Richter v. Union Land etc. Co.*, 129 Cal. 357, 375.

**Admission of Parol Evidence to Vary, When Harmless.**

The rule does not apply where the oral testimony goes to prove the theory of the case of the party objecting to the admission of the evidence: *Hobbs v. Duff*, 43 Cal. 489.

**Record Cannot be Varied by Parol.**

Where findings show that the plaintiffs are entitled to recover, and further determine their respective interests as between themselves in the subject matter of the action, parol evidence or affidavits cannot be received on a motion by the defendant to have the judgment satisfied, to show that the interests of the plaintiffs in the judgment are other or different from that shown by the findings: *Haggin v. Clark*, 71 Cal. 444, 9 Pac. 736, 12 Pac. 478.

Parol testimony is not admissible to vary terms of decree of divorce, or change the rights of the parties thereunder: *Wilson v. Wilson*, 45 Cal. 399.

In an action to impeach the title to the property acquired by an innocent purchaser at judicial sale, the plaintiff cannot contradict the record by proof that there was in fact no service of summons, or that the judgment was obtained by fraud: *Keeve v. Kennedy*, 43 Cal. 643.

Showing original verdict of coroner's jury to witness in criminal case, and asking the witness if he has signed the verdict, is not "an effort to prove the contents of a written record by parol": *People v. Donovan*, 43 Cal. 162.

The records of the board of supervisors of San Francisco, concerning the publication of notices of the awards of contracts for street improvements, cannot be contradicted by parol evidence: *Dorland v. McGlynn*, 47 Cal. 47.

Parol evidence is admissible to prove facts omitted from the record, unless the law expressly and impera-

tively requires all matters to appear of record, and makes the record the only evidence: *Gordon v. San Diego*, 108 Cal. 264, 41 Pac. 301.

#### **Parol Evidence to Explain Character of Instrument.**

Parol evidence in aid or authentication of an authentic act is always admissible: *Board of Education v. Keenan*, 55 Cal. 642.

Parol testimony will be received for the purpose of showing whether an instrument propounded as a will, which is not upon its face testamentary in its character, is such; and if it appears from the surrounding circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, and in such case, the particular form of the instrument is immaterial: *Clarke v. Ransom*, 50 Cal. 595.

Parol evidence is admissible when it relates to execution or authenticity of a written instrument, or to its delivery, or whether the delivery was absolute or conditional: *Verzan v. McGregor*, 23 Cal. 339.

#### **Effect of Parol Evidence on Loss of Instrument.**

Proof of the loss of an instrument does not open up the whole transaction to be exploited by parol evidence. Section 1856 of the Code of Civil Procedure limits the evidence to testimony as to the terms of the lost instrument, into which the transaction is assumed to have been crystallized: *Nicholson v. Tarpey*, 124 Cal. 442, 446.

Circumstances are provable in order to show agency and thus prove the validity of a writing in order to hold the principal: 137 Cal. 95, 100.

#### **Parol Evidence is Admissible Between Others than Parties, Their Representatives and Successors in Interest.**

The rule that parol evidence cannot be received to vary or contradict a written contract has no application to a controversy to which a stranger is a party: *Smith v. Moynihan*, 44 Cal. 53; *Hussman v. Wilke*, 50 Cal. 250.

When stranger to joint written contract, entered into by several persons, relies on it as evidence of a

partnership between the persons who signed it, in reference to the work the parties undertook by the contract to perform, such parties may show, by parol evidence, the true relations between themselves, even though such evidence vary or contradict its terms: *Smith v. Moynihan*, 44 Cal. 53.

The parol evidence rule cannot be invoked collaterally by entire strangers to the instrument: *Dunn v. Price*, 112 Cal. 46, 51.

**Time for Performance of Written Contract Might Formerly be Extended by Parol.**

Time for performance of simple contract in writing may be waived or extended by a subsequent oral agreement: *Waugenheim v. Graham*, 39 Cal. 169.

**Parol Evidence Admissible to Prove Conveyance a Mortgage.**

A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale: Code Civ. Proc., sec. 744.

The fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing such transfer to be a mortgage be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument: Civ. Code, sec. 2925.

If a deed absolute on its face is given for a loan of money, and intended as a mortgage, and a defeasance is at the same time, and as a part of the transaction, given by the grantee to the grantor, it is doubtful whether parol evidence is needed to show the deed a mortgage: *Gay v. Hamilton*, 33 Cal. 686.

If a deed absolute on its face is given and at the same time a defeasance is executed, parol evidence is admissible to show them parts of the same transaction: *Gay v. Hamilton*, 22 Cal. 686.

Great inequality between the value of the property conveyed and the price alleged to have been paid for

it is a circumstance tending strongly to show that a deed absolute in form was only a mortgage: *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410.

Upon an issue as to whether a deed absolute in form was intended as a mortgage, the assessment-book of the county, showing that the grantor had listed personal property only, is properly admitted in evidence as tending to show that the grantor did not consider the land his at the time of such listing, though inconclusive, and susceptible of explanation: *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957.

Parol evidence is admissible in equity to show that a deed, absolute on its face, was intended as a mortgage: *Pierce v. Robinson*, 13 Cal. 116; *Johnson v. Sherman*, 15 Cal. 287; *Cunningham v. Hawkins*, 27 Cal. 603; *Gay v. Hamilton*, 33 Cal. 686; *Vance v. Lincoln*, 38 Cal. 586; *Hopper v. Jones*, 29 Cal. 18; *Raynor v. Lyons*, 37 Cal. 452.

In California parol evidence is admissible at law, as well as in equity, to show that a deed absolute on its face was given as security for money, and is, in fact, a mortgage: *Jackson v. Lodge*, 36 Cal. 28; *Cunningham v. Hawkins*, 27 Cal. 603.

Such evidence is not restricted to cases of fraud, accident or mistake in the creation of the instrument: *Pierce v. Robinson*, 13 Cal. 116.

The fact that the grantor of the deed intended as a mortgage has subsequently conveyed the premises and delivered possession thereof to a third party cannot affect the question whether the deed was intended as a mortgage: *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957.

Upon the trial of an issue to determine whether a deed absolute upon its face was intended as a mortgage the declarations of a party to the deed and to the suit, made after the execution of the deed, are competent as evidence against himself: *Ross v. Brusie*, 64 Cal. 245, 30 Pac. 811.

Fact that transfer was made subject to a defeasance may be proved, though it does not appear by the terms of the instrument: *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410.

Where there is a deed absolute on its face, and a defeasance back, parol evidence is admissible to show whether the transaction constitutes a mortgage: *Farmer v. Grose*, 42 Cal. 169.

**Parol Evidence is Admissible to Show Fraud or Mistake.**

A mistake of the parties, or one and known to the other, is provable by parol to affect a written instrument: *Gardner v. California Guaranty etc. Co.*, 137 Cal. 71, 75.

Rule that verbal evidence is inadmissible to contradict or vary a written contract is inapplicable where a mistake has been made, and the object is to correct it: *Pierson v. McCahill*, 21 Cal. 122.

Parol evidence is always admissible in case of mistake or fraud in actions in equity to rescind a contract or to reform an agreement so as to make it speak the real intention of the parties: *Isenhoot v. Chamberlain*, 59 Cal. 630.

In the construction of a will parol evidence as to the attending circumstances is admissible; and obviously omitted words will always be supplied wherever the word omitted is apparent, and no other word will supply the defect: *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614.

A court of equity will relieve against mistake, as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show the mistake: *Wagenblast v. Washburn*, 12 Cal. 208; *Eldridge v. See Yup Co.*, 17 Cal. 55; *Lestrade v. Barth*, 19 Cal. 661.

Written admission that certain sum is due on contract, signed by the party making the admission, does not estop him from showing by parol testimony that there was a mistake in the admission: *Gradwohl v. Harris*, 29 Cal. 150.

The mistake in the recital as to the amount for which the attachment issued may be explained and corrected by parol: *Palmer v. Vance*, 13 Cal. 553.

When the defendant pleaded, in effect, that during the negotiations for the lease it was distinctly understood and agreed that the improvements above men-

tioned were the property of defendant; that he was to have the right to remove them on the expiration of the lease, and that such right was and should be one of the conditions of the lease; that, by accident or mistake, this condition was omitted, and that when the lease was presented to the defendant to sign he objected, and refused to sign it because of this omission; that on such refusal the plaintiff then and there agreed with him that such omission should make no difference, as the true conditions of the lease were well known to both parties; that relying on this agreement and the good faith and honesty of the plaintiff, the defendant executed the lease, parol evidence is admissible to prove the matters thus alleged: *Isenhoot v. Chamberlain*, 59 Cal. 630.

In an action by an assignee to recover a balance of an account parol evidence is admissible to show that a written assignment of the claim sued on, which omitted to name any assignee, was intended to affect the assignment to the plaintiff, and that the assignor had in fact made a parol assignment to him, and that the omission of his name from the writing was unintentional: *Owen v. Meade*, 104 Cal. 179, 37 Pac. 923.

When through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded: Civ. Code, sec. 1640.

When through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value: Civ. Code, sec. 3399.

Parol evidence is admissible for the purpose of enabling the court to ascertain whether or not the principles embodied in sections 1640 of the Civil Code are pertinent and applicable to the facts of any particular case: *Lassing v. James*, 107 Cal. 348, 40 Pac. 534.

Parol evidence may be introduced for the purpose

of showing what were the words omitted, and that they were omitted by mistake, but such evidence should clearly and fully establish the fact: *Hathaway v. Brady*, 23 Cal. 122.,

Plaintiff assigns to defendant, September 22d, two shares of stock in a mining company, stating in the assignment, "I authorize the transfer to him [defendant], with all the dividends made after the morning of the 23d of September." Both parties expected a dividend on Monday, the 22d. The trustees did not, in fact, declare dividends until between noon and 1 o'clock on Tuesday. Held, that the dividends belonged to plaintiff, and that parol evidence was admissible to explain the transaction and point its meaning: *Brewster v. Lathrop*, 15 Cal. 21.

If one of the terms of a written agreement is left out by mistake when the same is drafted, parol evidence of that fact may be received, and the agreement reformed, and made to correspond with the intentions of the parties: *Pierson v. McCahill*, 23 Cal. 249.

Parol evidence is admissible to show fraud in preparing a written application for an insurance policy: *Maxson v. Llewelyn*, 122 Cal. 195, 54 Pac. 732.

A postscript to a genuine letter may be shown by parol to have been added without the knowledge or authority of the writer where there is no circumstance of estoppel: *Robinson v. Nevada Bank*, 81 Cal. 106, 22 Pac. 478.

A written admission that a certain sum is due on a contract signed by the party making the admission does not estop him from showing by parol testimony that there was a mistake in the admission: *Gradwohl v. Harris*, 29 Cal. 151. See *Rice v. Heath*, 39 Cal. 609.

When through fraud or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value: Civ. Code, sec. 3399.



A note contained the clause, "with interest at the rate of two per cent until paid." The complaint averred that the agreement of the defendant was to pay interest at the rate of two per cent per month, but that by mistake the words "per month" were omitted in the note; and it was asked that the mistake be corrected by inserting the omitted words in the note, and for judgment thereon accordingly. The answer of the defendant denied that there was any agreement to pay two per cent per month, or that the words "per month" were omitted by mistake. The court held that the mistake might be proved by parol evidence, though such proof must have fully and clearly established the facts: *Hathaway v. Brady*, 23 Cal. 123; *Eldridge v. See Yup Co.*, 17 Cal. 55; *Lestrade v. Barth*, 19 Cal. 661.

In further support of the general rule, see *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243 (bill of sale); *Tyler v. Stone*, 81 Cal. 236, 22 Pac. 596; *Irving v. Cunningham*, 66 Cal. 15, 4 Pac. 766; *Dent v. Bird*, 67 Cal. 652, 8 Pac. 504 (deed); *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773.

#### **Gross Negligence not Relieved.**

If a person enters into a contract with another, between whom and himself no relation of especial trust or confidence exists, and it is reduced to writing by such other person, and the means of knowledge of the contents are equally open to both, and he signs it without reading, he cannot avoid liability, even if it differ from the verbal term. The fact that he is illiterate makes no difference: *Hawkins v. Hawkins*, 50 Cal. 558.

#### **Parol Evidence to Show Mistake Should be Clear.**

Oral testimony in contradiction of the plain terms of written instruments, or written admissions, should be clear, full and precise; and the weight to be given to such testimony diminishes from the date of the instrument which it purports to contradict or overcome: *Estate of Irvine*, 102 Cal. 606, 36 Pac. 1013.

**§ 1857. Place of Execution to Control Interpretation.**

The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

**Collateral Statutes—Lex Loc.**

A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made: Civ. Code, sec. 1646.

**§ 1858. Statutes or Instruments, how Construed.**

In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

*Cross-references:*

Intent to be ascertained, section 1859; particular intent to control generally, section 1859; surrounding circumstances may be shown, section 1860; usage as an aid to construction, section 1870, subdivision 12, section 1861; written words to control printed and instruction to be in favor of natural right, section 1866; construction of statutes and other writings is question of law for the court, section 2102.

See Jones on Evidence, section 172—Province of judge and jury—Mixed questions of law and fact—Construction of writings—Statutes, etc.

**Legislative Intent to be Ascertained.**

It is a cardinal rule that a statute free from ambiguity and uncertainty needs no interpretation, and interpretation is not allowable when the legislative intent, which it is the office of interpretation to ascertain, is clearly expressed: *Davis v. Hart*, 123 Cal. 384, 55 Pac. 1060.

**Intent to be Ascertained if Possible.**

The word "money," used in making a devise in a will, will be construed to include both personal and real property, if it appears from the context and on the face of the instrument that such was the intention of the testator: *Estate of Miller*, 48 Cal. 165, 17 Am. Rep. 422.

**Intent to Repeal.**

Whenever it clearly appears that the intention of the legislature, by a later act, is to revise the entire subject matter of a former act, the subsequent act operates as a repeal of the former, although it contains no precise words to that effect; even if the subsequent statute be not repugnant in all of its provisions to a prior one: *Dillon v. Bicknell*, 116 Cal. 111, 47 Pac. 937.

Repeals by implication are not favored in the law, and whenever there are two statutes upon the same subjects, courts will endeavor to harmonize them so that, if possible, effect may be given to the provisions of each. It is only when there is a repugnancy or inconsistency between them that the latter act will be held to repeal the prior one: *Hilton v. Curry*, 124 Cal. 84, 56 Pac. 784.

Although repeals by implication are not favored, and, where permissible, an earlier special statute will be construed to harmonize with a general later one, under the application of the maxim, *Generalia specialibus non derogant*; yet these rules only apply where a repugnancy between the two acts is not manifest, and where such repugnancy is manifest, the earlier statute will fall: *Miller v. Curry*, 113 Cal. 644, 45 Pac. 877.

**Effect to be Given to Every Part.**

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other: Civ. Code, sec. 1641.

**Maxim of Interpretation.**

An interpretation which gives effect is preferred to one which makes void: Civ. Code, sec. 3541.

**Rule Where Revision is Sought.**

In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be: Civ. Code, sec. 3401.

**§ 1859. Intent to be Ascertained if Possible.**

In the construction of a statute, the intention of the legislature, and in the construction of the instrument, the intention of the parties, is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it.

*Cross-references:*

See cross-references under section 1858.

**Rules of Statutory Construction.**

A statute relied upon as conferring rights to a governmental gratuity is to be strictly construed: *San Francisco v. Sharp*, 125 Cal. 534, 58 Pac. 173.

All statutes are to be construed prospectively, and not retrospectively, unless they are otherwise incapable of a reasonable construction: *Higgins v. Bear River Min. Co.*, 27 Cal. 159.

Words giving joint authority give authority to a majority unless otherwise expressed in the "act" giving the authority: Sec. 15, ante. Construction of this code: Secs. 4-18, ante.

General words are controlled by specific exceptions: *Lucas v. Payne*, 7 Cal. 96.

Where statutes make use of words and phrases of a well-known and definite sense in the law, they are to be received and expounded in the same sense in the statute: *Harris v. Reynolds*, 13 Cal. 518; *People v. Eddy*, 43 Cal. 332, 13 Am. Rep. 143.

Discussions in legislature, etc., cannot be referred to in construing statutes: *McGarrahan v. Maxwell*, 28 Cal. 95; *Harpending v. Haight*, 39 Cal. 194, 2 Am. Rep. 432; *Stockton etc. R. R. Co. v. Stockton*, 41 Cal. 147.

In the construction of remedial statutes, whenever the meaning is doubtful, they must be so construed as to extend to the remedy: *White v. Mary Ann*, 6 Cal. 470, 65 Am. Dec. 523; *Kent v. Laffan*, 2 Cal. 596; *Burnham v. Hays*, 3 Cal. 19.

Charters are special grants from the sovereign power, and are to be strictly construed: *Douglass v. Mayor. etc.*, 18 Cal. 647.

Where the counties of Sonoma and Marin were exempted from the provisions of certain of the sections of an act, the supreme court said it was to be inferred that the act applied to those counties not excepted: *Perey v. Ames*, 26 Cal. 378.

Forfeiture and constructive notice, construction of statutes thereon. These should be construed strictly: *Von Schmidt v. Huntington*, 1 Cal. 71; *Souter v. Sea Witch*, 1 Cal. 163; *Chamberlain v. Bell*, 7 Cal. 294.

Statutory provisions for acquiring jurisdiction of the person by publication of summons instead of a personal service must be strictly construed: *People v. Huber*, 20 Cal. 81; *Forbes v. Hyde*, 31 Cal. 356.

Force and meaning should be given to every clause and word, and courts will not, except in cases where the language is so vague and indefinite as to be wholly destitute of meaning or construction, reject any por-

tion of them: *Souter v. Sea Witch*, 1 Cal. 164; *Chever v. Hays*, 3 Cal. 473; *Smith v. Randall*, 6 Cal. 47, 35 Am. Dec. 475; *Seabury v. Arthur*, 28 Cal. 150; *People v. Waterman*, 31 Cal. 415.

The search for the meaning must not be confined to the doubtful passages or words, but may be extended to every provision of the act. Punctuation may be entirely disregarded, and the rules of grammar need not be strictly followed. *Mala grammatica non vitiat chartam*. But the search need not be confined to the letter of the statutes. The law looks to the substance, and not the form. *Qui haeret in litera, haeret in cortice*. If a particular construction has the effect to declare the act of any part of it unconstitutional, such construction must be avoided, when it can be fairly done. This, however, is to be taken with the qualification that where the language used is unambiguous, and the meaning clear and obvious, an unconstitutional consequence cannot be avoided by forcing upon it a meaning: *French v. Teschemacher*, 24 Cal. 539.

Where the meaning of the body of the act is doubtful, the title may be relied on as an assistance in arriving at a conclusion: *Flynn v. Abbott*, 16 Cal. 365; *State v. Conkling*, 19 Cal. 512; *People v. San Francisco*, 36 Cal. 595. See *Barnes v. Jones*, 51 Cal. 303, as to the headings of the titles, chapters, etc., of the code.

It is the duty of the court to give such a construction as will best carry the design of the legislature into effect, unless overruled by some controlling principle of law: *People v. Roberts*, 6 Cal. 216.

#### **Construction of Contracts—Intent to be Effected.**

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful: Civ. Code, sec. 1636.

The written admission of a party, made before any controversy has arisen, as to the meaning and effect of contract, outweighs his oral testimony given in contradiction thereof, after the controversy has arisen,

and the weight to be given to evidence contradicting a written instrument diminishes with its distance from the date of the instrument which it purports to contradict or overcome: *Moore v. Grayson*, 132 Cal. 602, 64 Pac. 1074.

Under section 1054 of the Code of Civil Procedure, the power given superior courts to extend the time for the service of notices includes the power to extend the time for filing the same: *Burton v. Todd*, 68 Cal. 45, 49.

### **Contemporaneous Construction.**

A case where the word "without" occurred twice in a provision, but it was apparent that in the instance in which it was used last, the word "within" was really intended, the court held that the provision must be so read: *Ex parte Hedley*, 31 Cal. 114; *People v. King*, 28 Cal. 265.

If the language is indeterminate, vague or susceptible of a more or less extensive sense, the intention must be presumed to be according to the laws of reason and equity, and for this purpose it is necessary to pay attention to the nature of the things to which the question relates. Contemporaneous exposition has ever been esteemed by jurists and statesmen as strong evidence in support of an interpretation: *Knowles v. Yeates*, 31 Cal. 86.

Therefore objections not raised for many years are stale and not favored: *Anderson v. Fisk*, 36 Cal. 638.

### **Rules of Construction of Writings.**

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity: Civ. Code, sec. 1638.

When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title: Civ. Code, sec. 1639.

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other: Civ. Code, sec. 1641.

Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together: Civ. Code, sec. 1642.

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties: Civ. Code, sec. 1643.

When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded: Civ. Code, sec. 1640.

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract: Civ. Code, sec. 1648.

Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract: Civ. Code, sec. 1652.

Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected: Civ. Code, sec. 1653.

Particular clauses of a contract are subordinate to its general intent: Civ. Code, sec. 1650.

Contracts, like statutes, by reason of which a forfeiture is claimed to have accrued, should be construed strictly: *Von Schmidt v. Huntington*, 1 Cal. 71; *Sprague v. Edwards*, 48 Cal. 248.

Conditions made by common carriers are to be strictly interpreted: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 27, 85 Am. Dec. 211.

If the habendum is irreconcilable with the premises, the latter must prevail: *Eldridge v. See Yup Co.*, 17 Cal. 50.

Deeds are to be construed most strongly against the grantor if there is any ambiguity: *Muller v. Boggs*, 25 Cal. 182; *Dodge v. Walley*, 22 Cal. 227, 83 Am. Dec. 61; *Salmon v. Wilson*, 41 Cal. 485.



A power of attorney as follows: "I give him full, complete, and perfect power, as my said attorney in fact, to do any and everything to secure my title to said rancho, and to prosecute the pretension of the same in all the courts of the United States; and by this, I ratify, confirm and approve all the doings of my said attorney in fact concerning said ranch"—does not authorize a sale: *Blum v. Robertson*, 24 Cal. 136.

The meaning of the word "enagenacion" is "alienation." The following clause in a Mexican conveyance: "In order that he may possess the same legally and pacifically, and make the use that suits him," is a mere formal one, and not intended as a limitation of the meaning of language previously used. The word "sedo" or "cedo," means "I grant": *Mulford v. Le Franc*, 26 Cal. 103.

A conveyance to L. B. & Co. vests the legal title of the same in L. B. alone: *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57.

Plaintiff assigned to defendant, on September 22d, two shares of stock in a mining company, stating in the assignment, "I authorize the transfer to him (defendant) with all the dividends made after the morning of the 23d of September." Both parties expected a dividend on Monday, 22d. The trustees did not, in fact, declare dividends until between noon and 1 o'clock on Tuesday. It was held that the dividends belonged to plaintiff; and that parol evidence was admissible to explain the transaction, and point its meaning: *Brewster v. Lathrop*, 15 Cal. 21.

In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations: Civ. Code, sec. 1318.

### **Construction of Wills.**

Wills are to be liberally construed, so as to effectuate the intention of the testator: *Welch v. Huse*, 49 Cal. 509.

A will is to be construed according to the intention of the testator. Where his intention cannot have

effect to its full extent, it must have effect as far as possible: Civ. Code, sec. 1317.

### **Construction of Pleadings.**

In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties: Code Civ. Proc., sec. 452.

### **Construction of County Boundaries.**

In describing courses the words "north," "south," "east" and "west," mean true courses, and refer to the true meridian unless otherwise declared: Pol. Code, sec. 3903.

The words "northerly," "southerly," "easterly" and "westerly," mean due north, due south, due east and due west, unless controlled by other words, or by lines, monuments, or natural objects: Pol. Code, sec. 3904.

The words "to," "on," "along," "with," or "by" a mountain or a ridge, mean summit point, or summit line, unless otherwise expressed: Pol. Code, sec. 3905.

The words "to," "by," "along," "with," "in," "up" or "down" a creek, river, slough, strait, or bay, mean the middle of the main channel thereof, unless otherwise expressed: Pol. Code, sec. 3906.

The words "in," "to," or "from" the ocean shore mean a point three miles from shore. The words "along," "with," "by" or "on" the ocean shore, mean on a line parallel with and three miles from the shore: Pol. Code, sec. 3907.

The mouth of a creek, river or slough which empties into another creek, river or slough, is the point where the middle of the channel intersects: Pol. Code, sec. 3908.

### **§ 1860. Surrounding Circumstances.**

For the proper construction of an instrument, the circumstances under which it was made, in-

cluding the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

*Cross-references:*

See cross-references under section 1858; evidence of usage to aid construction, section 1870, subdivision 12; construction of boundaries, section 1877.

See Jones on Evidence, sections 458, 459.

Proof of surrounding facts, section 458.

Same—Illustrations, section 459.

**Parol Evidence to Show Surrounding Circumstances.**

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates: Civ. Code, sec. 1647.

It is competent to show by parol evidence that the plaintiff had made advances of money as a stockholder to the corporation, which were the subject of the transfer, and thus explain the language of the contract by reference to the circumstances under which it was made: *Darby v. Arrowhead Hot Springs Hotel Co.*, 97 Cal. 384, 32 Pac. 454.

A ballot is to be construed as any other writing, and while a resort to parol evidence of extrinsic circumstances may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown by such or any evidence that the intention of the voter has anything different from what plainly appears upon the face of the ballot: *Rutledge v. Crawford*, 91 Cal. 526, 25 Am. St. Rep. 212.

It is proper to show circumstances under which a note was made, on an action by the indorser against the maker of a note which has been paid by the indorser: *Schultz v. Noble*, 77 Cal. 79, 19 Pac. 182.

A written contract of sale may be explained by reference to the circumstances under which it was made, and the matter to which it relates; and evidence of the circumstances attending the sale is ad-

missible to aid the court in arriving at the intention of the parties in the purchase and sale of a harvester manufactured by the vendor, of a peculiar build, and intended for a particular purpose: *Snyder v. Holt Mfg. Co.*, 134 Cal. 324, 66 Pac. 311.

Evidence of the circumstances under which the deed was made, and of the relation existing between the parties, is admitted, not to contradict or vary the deed, but to establish an equity superior to its terms: *Pierce v. Robinson*, 13 Cal. 116.

The interpretation of a contract entered into between the plaintiff and the defendant corporation by its president, which is susceptible of two different constructions, may be aided by evidence of conversations had between plaintiff and such president, showing how the contract was understood between them: *Balfour v. Fresno Canal etc. Co.*, 123 Cal. 359, 55 Pac. 1062.

The defendant sold and conveyed to the plaintiff certain water rights for the irrigation of a tract of land. The contract of sale provided that the defendant, in consideration of a cash payment and a yearly rental, should furnish to the plaintiff from its canal the quantity of water contracted for; that the defendant should place a suitable box or gate in the bank of its canal, at the most convenient point for the conveyance of water to the plaintiff's land, as soon as the plaintiff should commence the construction of a ditch, which was provided he should build "from said box or gate to said land, at his own risk, cost, and expense," for the purpose of taking said water upon his land. The contract further provided that the plaintiff would pay annually to the defendant, for a designated period, a yearly rental, "the first payment to be made, . . . after the water has been brought upon the said land." Held, that parol evidence of the circumstances surrounding the execution of the contract and of the declaration of the parties was admissible to explain the ambiguity of the contract with respect to the time when the plaintiff's obligation to pay rent commenced, and to show that such obligation did not attach until he actually made

use of the water: *Balfour v. Fresno etc. Co.*, 109 Cal. 221, 41 Pac. 876.

In an action to foreclose a mortgage evidence is admissible to show a deed of the property prior to the mortgage, and placed it in the hands of another person as a depositary, to be delivered after her death, and that the mortgagee had notice of the execution and deposit of the deed at the time he received his mortgage; and parol evidence is admissible to show all the facts and conditions upon which the deed was deposited: *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300.

Parol evidence is in general admissible to show surrounding circumstances in aid of interpretation: *Jenny Lind Co. v. Bower*, 11 Cal. 195; *Stanley v. Green*, 12 Cal. 162; *Hancock v. Watson*, 18 Cal. 140; *Mulford v. Le Franc*, 26 Cal. 88; *Saunders v. Clarke*, 29 Cal. 304; *Pio Pico v. Coleman*, 47 Cal. 67; *Preble v. Abrahams*, 88 Cal. 245, 22 Am. St. Rep. 301, 26 Pac. 99; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515; *Clarke v. Ransom*, 50 Cal. 595; *Verzan v. McGregor*, 23 Cal. 339.

Parol evidence of surrounding circumstances may be given in aid of the proper interpretation of an instrument, but where the parties themselves have used words which require no interpretation, where the words are understood there is no occasion for aid to their proper interpretation or meaning: *Cox v. McLaughlin*, 63 Cal. 196, 205.

Parol evidence is always admissible to explain the surrounding circumstances, and the situations and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the thing intended, and thereby to identify the subject matter, and to explain all technical terms and phrases used in a special or local sense: *Preble v. Abrahams*, 88 Cal. 245, 22 Am. St. Rep. 301, 26 Pac. 99.

Parol evidence is admissible to explain circumstances under which an assignment was made, and to show its object: *Renton, Holmes & Co. v. Monnier*, 77 Cal. 449, 19 Pac. 820.

To arrive at the intention the situation of the parties and the subject matter at the time of contracting should be considered; and the whole deed should be taken together, and, if possible, effect should be given to all its parts, although the immediate object of inquiry be the meaning of an isolated clause: *Brannan v. Mesick*, 10 Cal. 95.

In the construction of a will parol evidence as to the attending circumstances is admissible; and obviously omitted words will always be supplied wherever the word omitted is apparent, and no other word will supply the defect: *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614.

For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that they intended and understood the language in the sense contended for; and for that purpose the conversations between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown: *Balfour v. Fresno etc. Co.*, 109 Cal. 221, 41 Pac. 876.

Parol evidence is admissible to define the subject matter of a contract imperfectly described therein: *Cavanaugh v. Casselman*, 88 Cal. 543, 552.

Circumstances surrounding the execution of an instrument may be proved in order to establish it as a valid power of attorney: *Morffew v. S. F. & S. R. R. Co.*, 107 Cal. 587, 600.

Circumstances surrounding the execution of an uncertain deed may be resorted to to determine whether corporeal property or incorporeal property is conveyed: *Baker v. Clark*, 128 Cal. 180, 186.

### § 1861. Terms Presumed Used in Primary and General Acceptation.

The terms of a writing are presumed to have been used in their primary and general accepta-

tion, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

*Cross-references:*

See cross-references under sections 1858 and 1860; as to usage, section 1870, subdivision 12; construction of written notices, section 1865.

See Jones on Evidence, sections 461, 462, 463.  
Proof of meaning of words, section 461.  
Same—Illustrations, section 462.  
Same—Intention—Meaning of words and phrases, section 463.

**Words of Contract to be Understood in Ordinary Sense.**

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed: Civ. Code, sec. 1644.

**Technical Words Interpreted According to Usage.**

Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense: Civ. Code, sec. 1645.

**Terms Presumed Used in Primary and General Acceptation.**

This is the general rule: Reamer v. Nesmith, 34 Cal. 625; Jackson v. Feather River Co., 14 Cal. 23; Central Pacific R. R. Co. v. Beal, 47 Cal. 151; Preble v. Abrahams, 88 Cal. 245, 22 Am. St. Rep. 301, 26 Pac. 99.

When a slander or libel is couched in language having a covert meaning not apparent upon its face, or

in words or phrases not used otherwise than as slang, or cant terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed; but where the words are in general use they will be understood by the court in the same sense in which they are usually understood by the masses of men, and no allegation or proof of such meaning is necessary: *Edwards v. San Jose Printing and Pub. Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128.

In section 3886 of the Political Code, the word "recovery" means "get judgment," not "collect," the former being the meaning of general acceptance: *People v. Reis*, 76 Cal. 269, 279.

**Evidence is Admissible to Show Local, Technical or Otherwise Peculiar Signification.**

Evidence is admissible to show local meaning of word "stubble" in a contract: *Callahan v. Stanley*, 57 Cal. 476.

Parol evidence is admissible to meaning of expression "finished and ready for setting" as used by marble-cutters: *Myers v. Tibbals*, 72 Cal. 278, 13 Pac. 695.

Evidence is admissible to show that the words "gross ton" mean "long ton": *Higgins v. California Petroleum etc. Co.*, 120 Cal. 629, 52 Pac. 1080.

It is competent for the parties to give parol evidence as to whether the word "settle" meant "adjust" or "pay": *Auzerais v. Naglee*, 74 Cal. 60, 67.

It is competent to prove that the parties meant "to the land," although "upon the land" is the expression used: *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 226.

**Parol Evidence is Inadmissible Where Language Unambiguous.**

Where terms of writing are unambiguous, a witness cannot testify to his understanding of its meaning: *Donohoe v. Mariposa L. & M. Co.*, 66 Cal. 317, 5 Pac. 495.



Where the language of a deed executed by an officer for property sold under execution is plain and unambiguous, the court should limit its inquiry to what the words of the deed express, without regard to any intention independent of the words: *Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78.

In an action to enforce a written contract which is perfectly clear in its terms, parol evidence of prior conversations between the parties as to their understanding of its meaning is inadmissible: *Bryan v. Idaho Quartz Min. Co.*, 73 Cal. 249, 14 Pac. 859.

The rights of the parties to a written contract must be ascertained from its terms; and, whether the writing be lost or not, evidence of the intention of the parties in making it is inadmissible in the absence of fraud or mistake: *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101.

### § 1862. Written Words Control Printed.

When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

#### *Cross-references:*

See cross-references under sections 1858 and 1860.

### Written Words Control Printed and Original Matter Controls Forms.

Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parts and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded: *Civ. Code*, sec. 1651.

**§ 1863. Experts May Decipher Character or Declare Meaning of Language.**

When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.

*Cross-references:*

Opinions as to handwriting, section 1870, subdivision 9; proof of handwriting, section 1943; comparison of handwriting, section 1944; interpreters, section 1844.

**Experts on Trials for Forgery.**

Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such bank or company by the charter or act or incorporation, but it may be proved by general reputation; and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited: Pen. Code, sec. 1107.

**§ 1864. Where Terms are Differently Intended by the Parties, How Construed.**

When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and

when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

*Cross-references:*

Presumption as to acquiescence, section 1973, subdivision 27; when one party has led another to believe a particular thing, he is estopped to falsify, section 1962, subdivision 3.

**Interpretation Against Promisor.**

In cases of uncertainty not removed by the preceding rule, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party: Civ. Code, sec. 1654.

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it: Civ. Code, sec. 1649.

If the terms of a promise made in a contract are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it; and the language of the contract is to be interpreted most strongly against the party who caused the uncertainty to exist, and the promisor is presumed to be such party. Such presumption is furthered where it appears that the promisor drew the contract: *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391.

In the case of an ambiguity, that meaning which conforms to what one party suspected the other of believing is the proper one to adopt: *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 228.

When different constructions of a provision in an instrument are otherwise equally proper, that is to be

adopted which is most favorable to the party in whose favor the provision was made: *Sears v. Ackerman*, 138 Cal. 583, 586.

**Parol Evidence Admissible to Show Facts in Aid of Construction.**

Parol evidence is admissible for the purpose of enabling the court to ascertain whether or not the principles embodied in sections 1640, 1649 or 1654 of the Civil Code are pertinent and applicable to the facts of any particular case: *Lassing v. James*, 107 Cal. 348, 40 Pac. 534.

**§ 1865. Written Notice Construed According to Ordinary Acceptation of Its Terms.**

A written notice, as well as every other writing, is to be construed according to the ordinary acceptation of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment to the person to whom the notice is given.

*Cross-references:*

Presumption is that terms of writing are used in primary and general acceptation, section 1861; see cross-references under section 1861.

**Notice of Dishonor, How Construed.**

A notice of dishonor may be given in any form which describes the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored: Civ. Code, sec. 3143.

### § 1866. Construction in Favor of Natural Right Preferred.

When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

#### *Cross-references:*

Inconsistent provisions, section 1859; province of judge, section 1858, section 2102; where terms are intended in different sense by different parties, section 1864; and see cross-references under preceding section.

#### **Natural Right.**

Under section 1866 of the Code of Civil Procedure, "natural right" demands that the word "party," as used in section 170 of the Code of Civil Procedure, disqualifying a judge under certain circumstances, should be construed to include all parties in interest represented by parties of record: *Howell v. Budd*, 91 Cal. 342, 353.

Under section 1866 of the Code of Civil Procedure, "natural right" demands that section 230 of the Code of Civil Procedure should not be construed so as to make the existence of a family any more than the existence of a wife an indispensable element to a complete and perfect legitimation by a father: *Blythe v. Ayers*, 96 Cal. 532, 578.

#### **Interpretation in Favor of Contract.**

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties: Civ. Code, sec. 1643.

Stipulations which are necessary to make a contract reasonable or conformable to usage, are implied,

in respect to matters concerning which the contract manifests no contrary intention: Civ. Code, 1655.

All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded: Civ. Code, sec. 1656.

### **§ 1867. Material Allegation Only Need be Proved.**

None but a material allegation need be proved.

#### *Cross-references:*

What constitutes material evidence, section 1868; substance of material allegations must be proven, section 1868; evidence must be relevant, section 1868; collateral questions to be avoided, section 1868.

See Jones on Evidence, sections 233-235.

Common-law rules as to substance of the issue, section 233.

The modern rules as to substance of the issue—Amendments, sections 234, 235.

#### **Material Allegation Defined.**

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient: Code Civ. Proc., sec. 463.

#### **What Material Allegations Deemed True.**

Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party: Code Civ. Proc., sec. 462.

**None but Material Allegation Need be Proved.**

Evidence should not be received, if objected to, in support of facts set up in an affirmative count of the answer which ought to be stricken out as insufficient, nor will evidence in support of such defense sustain a verdict for the defendant: *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

It is not error to reject an offer of testimony by the defendant upon an allegation in the complaint which was denied by the answer, but to prove which the plaintiff had offered no testimony whatever: *Estate of Wooten*, 56 Cal. 322.

Evidence on part of defendant to disprove what plaintiff has failed to allege and prove, and which was necessary to sustain his cause of action, is properly excluded as immaterial: *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386.

**Allegation of Nonpayment.**

Although the allegation of nonpayment is a material one in an action *ex contractu* for money due, the burden of proof is on the defendant to prove payment: *Hurley v. Ryan*, 137 Cal. 461, 462; *Malone v. Ruffino*, 129 Cal. 514.

**§ 1868. Allegata and Probata Must Correspond  
—Collateral Questions, When May be In-  
quired into.**

Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

*Cross-references:*

Acts showing credibility may be proven, section 1870, subdivision 16; evidence of character of witness may be given, section 1847; impeachment of witness, section 2051; evidence of particular wrongful evidence not admissible, section 2051; prior inconsistent statements, section 2052; jury are exclusive judges of credibility, section 2061, subdivision 2; none but material allegations need be proven, section 1867.

See Jones on Evidence, sections 233-235, 136-170.

Common-law rules as to substance of the issue, section 233.

The modern rules as to substance of the issue—Amendments, sections 234, 235.

Relevancy—In general, section 136.

Logical connection between fact offered and fact to be proved, section 137.

Same—Illustrations of relevant facts, sections 138, 139.

Acts between strangers or between a party and strangers, section 140.

Facts apparently collateral may become relevant, section 141.

Same—Knowledge—Intent, section 142.

Same—Proof of other crimes than the one in issue, section 143.

Same—Such evidence—How limited, section 144.

Collateral facts to show good faith—Knowledge, etc., section 145.

Facts apparently collateral to repel the inference of accident, section 146.

Character—When relevant, section 147.

Qualifications of the rule—Libel and Slander, section 148.

Same—Nature of proof—Pleadings—Rumors, section 149.

Character—Actions for breach of promise of marriage, section 150.

Seduction and criminal conversation, section 151.

Same—Actions for bastardy, section 152.

Character in actions for fraud, sections 153, 154.

Character—Actions for malicious prosecution, section 155.



**Proof of good character, section 156.**

**Proof of financial standing—Exemplary damages, section 157.**

**Same—Compensatory damages, section 158.**

**Financial standing of plaintiff, section 159.**

**Mode of proving financial standing, section 160.**

**Relevancy of facts apparently collateral—Negligence cases, sections 161, 162.**

**Relevancy of disconnected facts to show defective machinery—Railroad fires, sections 163, 164.**

**Facts apparently collateral—Value of lands, sections 165, 166.**

**Proof of intent—Motives and belief, section 167.**

**Evidence made relevant by that of the adverse party, section 168.**

**Same—Rebuttal or explanation of irrelevant testimony, section 169.**

**General rules as to relevancy, section 170.**

### **Allegations and Proof Must Correspond.**

A consequence of the rule is that evidence of a fact essential to the support of the action cannot be heard unless it be averred in the complaint: *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672.

Other averments material to the case omitted from the pleading cannot be supplied by the evidence: *Murdock v. Clarke*, 59 Cal. 683; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725.

The rule that the *allegata* and *probata* must correspond was not abrogated by the civil practice act; *Stout v. Coffin*, 28 Cal. 65.

A plaintiff cannot recover upon cause of action developed by proofs but not stated in the complaint: *Burke v. Levy*, 68 Cal. 32.

Plaintiff cannot recover where the contract declared on is essentially different from the contract: *Cox v. McLaughlin*, 63 Cal. 196, 207.

However liberal the rules of pleading may be in a justice's court, the complaint must state the cause of action relied upon, and in that, as in every court, the allegations and proofs must correspond, and the

judgments must be upon the demand and within the pleadings: *Terry v. Superior Court*, 110 Cal. 85, 42 Pac. 464.

Plaintiffs were bound to establish their case as alleged, and cannot rely upon any ground of recovery not pleaded; and where the evidence did not warrant a recovery under the facts averred, and no request was made for leave to amend the pleadings to conform to facts proved, so as to authorize a recovery upon another theory, the findings against them will not be disturbed because upon a different state of the pleading plaintiffs might have been entitled to recover: *Rogers v. Kimball*, 121 Cal. 247, 53 Pac. 648.

Where an attorney, sued by the insolvent bank upon a note executed by him thereto, alleged in defense a special contract made with the acting president of the bank, employing him to assist as special counsel in litigation for the bank, in consideration of a surrender and cancellation of the note, without relying upon any counterclaim for the value of work and labor performed by him for the benefit of the bank, he cannot recover upon a quantum meruit: *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634.

If the complaint alleges a promise to pay money to a corporation, and the promise proved was made to a committee of a church, there is a fatal variance between the complaint and proof: *Christian College v. Hendley*, 49 Cal. 347.

The party making an allegation in a pleading that the sale of a mining claim under which he claims title was in writing is not thereby precluded from proving that the sale was a verbal one: *Patterson v. Keystone Min. Co.*, 30 Cal. 360.

A joint contract cannot be given in evidence where the pleadings set up a several contract alone: *Stearns v. Martin*, 4 Cal. 227.

An alleged cause of action for goods sold and delivered is not sustained by proof of delivery of the goods to the defendant, to be sold on commission: *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089.

A plaintiff who bases his right to an accounting upon an allegation of a partnership between himself and the defendant is not entitled to such relief upon the mere proof of a tenancy in common: *Noonan v. Nunan*, 76 Cal. 44, 18 Pac. 98.

Where the complaint alleged that the plaintiffs became tenants in common with the defendants in the ditch and water rights in controversy by express agreement with the defendants, who were the then owners, in consideration of the plaintiffs' labor, the plaintiffs cannot recover upon an unpleaded theory, inconsistent with their allegation, that the labor done by them and the defendants in enlarging the ditch destroyed the identity of the original ditch, and created a new one, in which the plaintiffs were entitled to share as tenants in common with the defendants: *Hayes v. Fine*, 91 Cal. 391, 27 Pac. 772.

Where the complaint to foreclose the lien alleged and the claim of lien stated, that the work was done under a contract by which the claimant was employed to do the work at an agreed price, but the evidence of the plaintiff showed that, except as to one small item, there was no agreed price for any of the work, the variance is fatal: *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195.

Under an information charging a county clerk with omission and refusal to pay over moneys to his successor, he cannot be convicted for failure to pay the moneys to the county treasurer: *People v. Hamilton*, 103 Cal. 488, 37 Pac. 627.

Unless the facts essential to the support of the case be alleged in the pleadings, evidence upon such omitted facts cannot be heard or considered: *Hicks v. Murray*, 43 Cal. 515.

Where there is neither allegation nor evidence in an action upon promissory notes, that outstanding accounts in favor of the plaintiff were sold to the defendants, or formed any part of the consideration of the notes sued upon, there can be no recovery in the action for moneys collected upon said accounts, and evidence in reference to such outstanding accounts, and as to whether defendants had collected any of

them, is inadmissible: *Kriess v. Faron*, 118 Cal. 142, 50 Pac. 388.

A counterclaim must be pleaded, and, in the absence of such pleading, an offer to show that the claim of the petitioner for an order of sale had been paid by reason of his having had the use and occupation of part of the estate, for which he should account in a sum equivalent to the amount of his claim, is properly excluded: *In re Coutts*, 100 Cal. 400, 34 Pac. 865.

Forfeiture of a mining claim under local mining laws must be specially pleaded, and cannot be shown under the general issue: *Morenhaut v. Wilson*, 52 Cal. 263.

#### **What is Material Evidence.**

Matters which circumstantially tend to prove the issue are deemed material, and any evidence tending in a material degree to strengthen the case of a party to an action is material to the issue: *People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155.

Anything which shows plaintiff has no right of recovery at all, or to the extent claimed on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer: *Bridges v. Paige*, 13 Cal. 640.

#### **Not Necessary to Prove Admitted Facts.**

It is not necessary to prove admitted facts, and it is not error to reject testimony thereon: *Hurlburt v. Jones*, 25 Cal. 225; *Tully v. Harloe*, 35 Cal. 306, 95 Am. Dec. 102; *Tevis v. Hicks*, 41 Cal. 127; *Patterson v. Sharp*, 41 Cal. 133; *Jones v. Spears*, 47 Cal. 20; *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

All evidence contrary to such admissions should be disregarded: *Hall v. Polack*, 42 Cal. 225.

It is error to admit such evidence if a proper objection be interposed: *Turner v. White*, 73 Cal. 299, 14 Pac. 794.

An averment in the complaint that the court had decided certain facts in the former action carries

with it the admission that the decision was sustained by sufficient evidence to support it, and precludes evidence for the plaintiff to prove the contrary; nor is the effect of such admission qualified or controlled by an averment in the complaint of the contrary fact sought to be proved: *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, 566, 30 Pac. 1108.

A fact alleged in the complaint and not denied in the answer becomes an admitted fact in the case: *Merguire v. O'Donald*, 103 Cal. 50, 36 Pac. 1033; *McGowan v. McDonald*, 111 Cal. 57, 72, 52 Am. St. Rep. 149, 43 Pac. 418.

#### **Collateral Question Must be Avoided.**

Under the rule that testimony must be confined to the issues, evidence of collateral facts, which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, is inadmissible: *People v. Lynch*, 122 Cal. 501, 55 Pac. 248.

#### **Evidence Admissible Under Particular Issues.**

Where defendant's answer is a general denial, it has the same influence as a plea of the general issue at common law; and accord and satisfaction may be given in evidence: *Gavin v. Annan*, 2 Cal. 494. Reversed, 10 Cal. 30, 21 Cal. 50.

The effect of this general denial is that any matter can be given in evidence which shows that plaintiff never had any cause of action, and most matters in discharge of the action: *McLarren v. Spalding*, 2 Cal. 510.

And where general denial is the equivalent of the plea of nil debet, eviction, payment, release, etc., may be given in evidence: *McLarren v. Spalding*, 2 Cal. 510.

Under general denial payment or failure of consideration may be proved, and it admits nothing but the execution of the instrument declared on: *Brooks v. Chilton*, 6 Cal. 640.

In an action against the estate of a deceased woman to recover for services alleged to have been

there was not a subsisting cause of action at the time the suit was brought; and tender and setoff, which must be specially pleaded, are not exceptions to the rule; because those defenses admit a good cause of action: *Meredith v. Santa Clara M. Co.*, 56 Cal. 178.

Payment may be proved under answer denying that the defendant has not paid the plaintiff in full, or that there is now due from the defendant to the plaintiff any sum whatever, although the payment is not affirmatively averred in an action of assumpsit: *Mickle v. Heinlen*, 92 Cal. 596, 28 Pac. 784.

In an action against a sheriff for the recovery of personalty the defendant, under the plea of justification, may show that the claim of the plaintiff is based upon a transfer constructively fraudulent as to creditors: *Stephens v. Hallstead*, 58 Cal. 193, 194.

In an action to recover personal property, where the defendant justified as sheriff under a judgment and execution against the plaintiff's vendor, whose property the answer alleged the goods to be, although fraud had not been specially pleaded, the judgment-roll under which the defendant justified, and also evidence tending to show that the sale by the judgment debtor, under which the plaintiff claimed, was not followed by an actual and continued change of possession are admissible: *Humphreys v. Harkey*, 55 Cal. 283. Cited 58 Cal. 197; 88 Cal. 397.

Under averment of ownership in fee and of right to possession at the commencement of the action, the plaintiff may prove any facts which would entitle him to recover at that time: *Gillespie v. Jones*, 47 Cal. 259. Cited 4 Colo. 43; 4 Mont. 512; 5 Mont. 100; 5 Utah, 215.

Under allegation of ouster a holding over by the defendant may be shown: *Garrison v. Sampson*, 15 Cal. 93.

A general allegation in a complaint for the diversion of water, that plaintiffs were entitled to all the water flowing into the canyon at the head of their ditch, entitled them to prove a diversion of water from the smaller branches of the canyon supplying

water to that point: *Priest v. Union Canal Co.*, 6 Cal. 170. Cited 11 Cal. 153.

Where defendant simply denied allegation of complaint, in an action of ejectment to recover the possession of land, held, that he could not introduce in evidence a copy of the record of a former recovery: *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

In an action for the taking of personal property—the plaintiff alleging ownership and possession of the property, and a taking by the defendant, and the answer consisting of a general denial—no evidence is admissible except as to the ownership and taking: *Pico v. Kalisher*, 55 Cal. 153.

In an action against an administrator to recover moneys alleged to have been deposited with the decedent under a promise to repay the same to the plaintiff, evidence is admissible under the general issue, showing that no money was in fact deposited by plaintiff with the decedent, and that the debts in suit were gambling debts from the decedent to plaintiff and his assignors, for moneys lost to them at the game of poker: *Frank v. Pennie*, 117 Cal. 254, 49 Pac. 208.

Upon the issue as to whether defendant owed plaintiff the balance of account alleged by them, proof as to the motives of plaintiffs in bringing the action is immaterial: *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

Evidence introduced upon one issue is available to establish any of the issues in the case, but cannot be used to establish an issue not made by the pleadings: *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299.

Upon a trial for larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, the allegation of the indictment or information, so far as regards the description of the property, is sustained, if the offender be proved to have embezzled or stolen any money, bank notes, certificates of stock, or valuable security, although the particular species of coin or other money, or the number, de-

nomination, or kind of bank notes, certificates of stock, or valuable security, be not proved; and upon a trial for embezzlement, if the offender be proved to have embezzled any piece of coin or other money, any bank note, certificate of stock, or valuable security, although such piece of coin or other money, or such bank note, certificate of stock, or valuable security, may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. (Amendment approved April 9, 1880; Amendments 1880, p. 23. In effect April 9, 1880.) Pen. Code, sec. 1131.

### **Controverting New Matter in Answer.**

Plaintiff may introduce upon trial evidence of any fact which countervails or overcomes any new matter set up as a defense in the answer to the complaint. And the same rule applies to the answer to a cross-complaint: *Colton etc. Co. v. Raynor*, 57 Cal. 588.

The statement of any new matter in an answer, in avoidance or constituting a defense or counterclaim, is deemed upon the trial to be controverted by the opposite party, and any proper evidence is admissible to meet and overcome such defense: *Williams v. Denison*, 94 Cal. 540, 29 Pac. 946.

Under section 462 of the Code of Civil Procedure, which provides that "the statement of new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party," a plaintiff is entitled to introduce on the trial any evidence which countervails or overcomes such new matter, and may introduce evidence of fraud, though no fraud is pleaded in the complaint: *Sterling v. Smith*, 97 Cal. 343, 32 Pac. 320.

### **Immaterial Variance.**

The fact that an indictment omitted to set forth the rate of interest described in the note, and a provision therein in regard to attorney's fees, does not show a material variance, where the note corresponds



with the allegations made in the indictment so far as described therein: *People v. Terrill*, 133 Cal. 120, 65 Pac. 303.

In an action to foreclose a mortgage given to secure a promissory note, where the evidence raises no question as to the identity of the debt and note secured, slight differences between the note and the copy thereof contained in the mortgage are not fatal variances: *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624.

Where the information charged the defendant with having robbed a Chinese company of a specified sum, and the evidence shows that that sum was taken, but that only part of it belonged to the company, there is no such variance as entitled the defendant to an acquittal: *People v. Clark*, 106 Cal. 32, 39 Pac. 53.

In an action for conversion the date of the conversion alleged in the complaint is not material, and a variance in proof as to the date, if prior to the commencement of the action, will not warrant a reversal of the cause: *Bancroft Co. v. Haslett*, 106 Cal. 151, 39 Pac. 602.

Evidence that money paid to the defendant by the witness came from the separate estate of his wife, and was given by her to the witness to provide the security required by the defendant does not show a material variance from the allegation of the information that the property belonged to the husband: *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506.

The failure to prove an offense of the exact date charged in the complaint is not a fatal variance: *People v. Williams*, 133 Cal. 165, 65 Pac. 323.

Where there is no variance between the allegations and the proof as to portions of the property described in the information, a variance as to a particular piece of property is in no way fatal to a judgment of conviction: *People v. Martin*, 102 Cal. 558, 36 Pac. 952.

Where it is alleged in the complaint that goods damaged by water through the negligence of a water company were in the building of the plaintiff, proof

that some of them were on the roof of the building is not a material variance: *Yik Hon v. Spring Valley W. W. Co.*, 65 Cal. 619, 4 Pac. 666.

In an action under the statute for causing, by wrongful act, the death of a person, where the allegation of the complaint was that defendants owned, as tenants in common, the entire block in front of which the accident occurred, and the proof was that they owned it in distinct parcels in severalty, the variance was immaterial: *Gay v. Winter*, 34 Cal. 153.

The plaintiff alleged that "Hull & Co." were indebted to him, but failed to prove that there were others in company with Hull in the transaction. Held, that the words "and company" might be treated as surplusage, and the action proceed as against Hull alone: *Mulliken v. Hull*, 5 Cal. 245.

A complaint (where there is more than one plaintiff) in an action to recover damages for the alleged seizure of goods, which avers that the defendant took and carried away "certain goods, chattels and effects, of and belonging to the said plaintiffs," does not necessarily aver a joint ownership of the goods in the plaintiffs; but would be sustained by proof that the plaintiffs owned the property as partners, or as tenants in common, and that their respective interests therein were very unequal: *Pelberg v. Gorham*, 23 Cal. 349.

The action was brought to recover for the wrongful conversion of certain shares of capital stock of a corporation. The company averred generally that the plaintiff loaned the stock to the defendant, and that he converted it to his own use. The evidence showed that the stock was loaned for the special purpose of being used by the defendant to raise money to pay and take up a certain promissory note of which the defendant was maker and the plaintiff the accommodation indorser, and that the defendant did not use it for that purpose, but converted it to his own use. The answer denied that the plaintiff was the owner of the stock, or that the defendant had borrowed it, and averred that he had bought it of the plaintiff. Held, that the variance between the evidence and the

allegations of the complaint was immaterial, as under the pleadings the defendant could not have been misled to his prejudice: *Hitchcock v. McElrath*, 72 Cal. 565, 14 Pac. 305.

Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs: Code Civ. Proc., sec. 470.

#### **Variance in Signatures.**

In an action against a common carrier for not complying with the contract to carry and deliver a draft, the complaint alleged that it was signed "John Q. Jackson"; the proof showed that it was signed "John Q. Jackson, Agent." Held, that the variance was immaterial: *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263.

Where the plaintiff declared upon a note made by one McKinley and one Campbell, and gave in evidence a note signed by H. C. McKinley and C. Campbell & Co., held, that the variance was important and substantial, and that the district court erred in admitting it in evidence: *Cotes v. Campbell*, 3 Cal. 101.

If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full, and states the rate of interest in words as well as figures, the variance is immaterial: *Corcoran v. Doll*, 32 Cal. 82.

#### **What Variance Deemed Material.**

No variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just: Code Civ. Proc., sec. 469.

Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not

in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof: Code Civ. Proc., sec. 471.

Plaintiff sues to enjoin the enforcement of a judgment recovered by defendant T. against plaintiff G., and avers that G. paid T. the amount of the judgment and procured an assignment of it to defend V., who seeks to enforce it against plaintiff. Held, that on the trial plaintiff could not be permitted to show that G. paid the judgment with the joint funds of himself and plaintiff, because the complaint avers the payment to have been made by G.: *Coffee v. Tevis*, 17 Cal. 239.

Where a complaint alleges a specific title to water by appropriation and contains no other allegation of ownership or title to the water, the only right pleaded being a particular right not resting in grant, a paper writing offered as evidence of a grant conferring title is at variance with the allegation of the complaint, and should not be received in evidence: *Shenandoah M. & M. Co. v. Morgan*, 106 Cal. 409, 39 Pac. 802.

The name of the party assaulted is a material element of the offense of an assault with a deadly weapon, and where the complaint charged the assault to have been made upon the person of one George Magin, and the information charged it to have been made upon the person of one George Massino, the variance is fatal: *People v. Christian*, 101 Cal. 471, 35 Pac. 1043.

Where the complaint charges a conspiracy to defraud, but does not charge negligence, the defendants cannot be held liable for loss and damage caused by their mere negligence: *Fox v. Hale & Norcross Silver M. Co.*, 108 Cal. 369, 41 Pac. 308.

Where the cause of action alleged in the complaint is based upon a special contract recovery cannot be had upon the theory of a constructive involuntary trust, as to which no allegations are made in the complaint: *Gray v. Farmers' Exchange Bank*, 105 Cal. 60, 38 Pac. 519.

If the answer sets up as a defense in an action on a bill of exchange a total failure of consideration, and the proof shows a partial failure only, the variance is not an available one under our practice: *Plate v. Vega*, 31 Cal. 383.

**Proof Must be Objected to on Ground of Variance, or Point is Waived.**

When the case made by plaintiff's proof differs from the averments of the complaint, and defendant makes no objection to the introduction of the evidence on this ground, the supreme court will not reverse the judgment on account of the variance: *Marshall v. Ferguson*, 23 Cal. 65.

When the pleadings aver a contract to be fulfilled at a specified time, and a written agreement of contract, to be fulfilled at another time, is offered in evidence, the offer is obnoxious to no objection but that of "variance"; and if this objection be not taken, and it be shown that the time of performing the written agreement had been extended by a subsequent oral agreement, so as to correspond with the pleading, all objections are thereby cured: *Waugenheim v. Graham*, 39 Cal. 169.

Objections to the sufficiency of a complaint to support the proof cannot be made after a verdict is rendered upon the trial of the case, if the complaint is sufficient to support the judgment: *Horn v. Hamilton*, 89 Cal. 276, 26 Pac. 833.

But a variance between the pleading and the proof may be taken advantage of, either by objection to the admissibility of the evidence of a cause of action not pleaded, or by motion for nonsuit, and the defendant is not precluded from moving for a nonsuit by reason of his failure to object to the admissibility of the evidence: *Elmore v. Elmore*, 114 Cal. 516, 46 Pac. 458.

Where no objection was made in the trial court in any stage of the proceeding to a variance between the complaint and the stipulated terms of the contract agreed upon by the parties at the trial, a judgment for the plaintiff will not be reversed upon appeal on account of such variance: *Colfax etc. Co. v. Southern Pacific Co.*, 118 Cal. 648, 50 Pac. 775.

Where the pleading was objectionable in not setting out the facts, but was not objected to, and evidence of the joint contract and of the agreement between plaintiff and his copartner showing the right of plaintiff to recover was received without objection at the trial, objection cannot be urged upon appeal for the first time, as it could have been obviated by an amendment of the complaint, and objection to the pleading was waived by not being taken at or before the trial: *Baxter v. Hart*, 104 Cal. 344, 37 Pac. 941.

An objection to evidence on the ground of variance from the allegations of the complaint, it appearing that the defendants were not misled by the evidence, and failed to raise any objection at the trial, cannot be considered upon appeal for the first time: *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936.

An objection to evidence on the ground that it is immaterial, irrelevant and incompetent, in that it does not support the allegations of the complaint, is not sufficient to raise the question of variance: *Knox v. Higby*, 76 Cal. 264, 18 Pac. 381.

If, in the progress of a trial, evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, the error is waived, and the court may instruct the jury in relation to the whole field of inquiry covered by the evidence: *Boyce v. California Stage Co.*, 25 Cal. 460.

If the cause of action shown by the evidence is somewhat, but not radically, different from that stated in the complaint, the objection should be presented, either by a specific objection to evidence, or by a motion for nonsuit, particularly indicating the precise ground: *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382.

Where the complaint in an action on a bill of exchange describes it as payable to the order of A, whereas the bill offered in evidence is drawn payable to B, it is a variance to be taken advantage of by objecting to the evidence, or by a motion of nonsuit: *Farmer v. Cram*, 7 Cal. 135.

If the plaintiff claims damages from a railroad by reason of the negligence of one of its employees, and the evidence of the plaintiff tends to show that the act of the employee was willful and without the scope of his duty, the defendant must take advantage of it by action for a nonsuit, or asking an instruction to the jury: *Hahn v. Southern Pac. R. R. Co.*, 51 Cal. 606.

A material variance between the contract as alleged and proved is a ground of nonsuit, unless the plaintiff obtains leave to amend his complaint so as to make it conform to the proofs: *Tomlinson v. Monroe*, 41 Cal. 94.

#### **Meaning of Relevancy.**

Meaning of word "relevant," as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it: *Moran v. Abbey*, 58 Cal. 163.

#### **§ 1869. Affirmative and Negative Allegations.**

Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

#### ***Cross-references:***

What facts may be proven on trial, section 1870; burden of proof, section 1981; notice to produce documents in possession of adverse party, section 1855, subdivision 2; if a writing is in custody of adverse

party, he must have notice to produce, section 1938; in civil cases the affirmative of the issue must be proven, section 2061, subdivision 5.

See Jones on Evidence, section 178—How affected by form of issue—Whether affirmative or negative.

#### **Affirmative Allegations Must be Proved.**

Necessary affirmative allegations must be proved or the action will fail: *In re Madera Irr. Dist.*, 92 Cal. 296, 333.

#### **Negative Allegations.**

Where party has to prove a negative, the law does not demand plenary proof, but he must produce some evidence: *Kohler v. Wells, Fargo & Co.*, 26 Cal. 611.

Slight proof makes out prima facie case when negative is to be proved. In all such cases rebuttal is comparatively easy, and is of imperative obligation: *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183.

#### **Want of Negligence.**

An injury to a passenger having been proven, the burden of proof is on the railroad to disprove negligence: *Watson v. California C. R. R. Co.*, 94 Cal. 166, 174; *Osgood v. Los Angeles etc. Co.*, 137 Cal. 280, 283; *Petaluma Paving Co. v. Singley*, 136 Cal. 616, 618.

#### **Contest of Will.**

Contestants of probate of will are plaintiffs in the matter, and it devolves upon them to allege all facts necessary to sustain a claim that the will was not properly signed and witnessed, and a statement in the language of the statute, or of the evidence of the facts, is not sufficient. Allegations that the will was procured to be signed and witnessed under a mistaken belief of the testator as to its provisions, and while he was under the absolute control and dominion of his wife, do not present an issue as to the signature and attestation of the will by two witnesses at the request and in the presence of the testator, while he was mentally capable of recognizing the act and



actually conscious of the transaction: Estate of Burrell, 77 Cal. 479, 19 Pac. 880.

### § 1870. What May be Proven on Trial.

In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute;
2. The act, declaration, or omission of a party, as evidence against such party;
3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;
4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;
5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner,

joint debtor, or other person jointly interested with the party;

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;

7. The act, declaration, or omission forming part of a transaction, as explained in section 1850;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;

12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family Bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

14. The contents of a writing, when oral evidence thereof is admissible;

15. Any other facts from which the facts in issue are presumed or are logically inferable;

16. Such facts as serve to show the credibility of a witness, as explained in section 1847.

*Cross-references:*

Evidence confined to material allegations, section 1868, section 1867; affirmative of issue to be proven, section 1869; burden of proof, sections 1869, 1981; offer of compromise not an admission, section 2078; preliminary questions on admission of evidence are addressed to the court, section 2102.

Subdivision 1. Evidence must be relevant, section 1868; collateral questions avoided, section 1868; direct evidence defined, section 1831; witness must testify to precise fact in issue, though answer tends to degrade, section 2065.

Subdivision 2. Admissions of a party are indirect evidence, section 1832, and cross-references under section 1832; evidence of oral admissions of a party should be viewed with caution, section 2061,

Subdivision 16. Credibility of witness is question for jury, section 1847; and they are so instructed, section 2061, subdivision 2; credibility and how attacked, section 1847, section 2051; evidence of particular wrongful acts, section 2051; prior inconsistent statements, section 2032; see general cross-references under sections 1847 and 2051.

See Jones on Evidence—Subdivision 1, chapter V. Relevancy, chapter V.

Subdivision 2, chapter IX, XI.

Admissions, chapter IX.

Res gestae, chapter XI.

Subdivision 3, section 291.

Admissions may be implied from silence, section 291.

Subdivision 4, sections 316-322, 327-333, 334-338.

Declarations as to pedigree—Reason for the exception, section 316.

Same—Declarant's relationship—How proved—Particular facts, section 317.

Are the declarations limited to cases where pedigree is the direct subject of the suit? Section 318.

Acts and conduct of relatives admissible as well as declarations—Written declarations, section 319.

Same—Family recognition of writings and records, section 320.

Weight of such testimony, section 321.

Declarations only admissible after death of the declarant, section 322.

Declarations of deceased persons against interest—In general, section 327.

Sufficient if the entries are prima facie against interest, section 328.

Same—Evidence of collateral facts, section 329.

Rule when the declaration is made by an agent, section 330.

Declarant need not have actual knowledge of the transaction, section 331.

Such declarations inadmissible to prove contracts, section 332.

General rules on the subject, section 333.

Dying declarations, section 334.

Limited to cases of homicide and when made in expectation of impending death, section 335.

Declarant must have been competent to testify, section 336.

Declarations must be confined to the homicide, section 337.

Form of the declaration—General rules, section 338.  
Subdivision 5, sections 359, 360, 256, 257, 249-252, 253, 254.

Declarations of agents, section 359.

Declarations by agents of corporations, section 360.

Declarations of agents, section 256.

Same—Effect of such declarations, section 257.

Declarations of persons having a joint interest--  
Partners, section 249.

Same—Statutes of limitation as affecting admissions of partners, section 250.

Admissions after dissolution of partnership, section 251.

Partnership to be proved before admissions are received, section 252.

Admissions by joint contractors, not partners, section 253.

Declarations by persons having a mere community of interest, section 254.

Subdivision 6, section 255.

Declarations by wrongdoers—Conspiracy, section 255.

Subdivision 7, chapter XI.

Res gestae, chapter XI.

Subdivision 8, sections 339-346.

Evidence of witnesses given in former action or on former trial, section 339.

Exact identity of the parties not necessary, section 340.

Parties should be substantially the same or in privity, section 341.

Form of proceedings may be different, section 342.

The opportunity of cross-examination on the former trial, section 343.

Death of the former witness—Relaxation of the rule, section 344.

Same—Absence from state—Other disability—Criminal cases, section 345.

Mode of proving former testimony—Refreshing memory, section 346.

Subdivision 9, sections 368, 558-562 chapter XII.

As to sanity in will cases—In general—Conclusion, section 368.

Proof of handwriting—Writer need not be called, section 558.

One who has seen another write is competent to testify as to his handwriting, section 559.

Knowledge of handwriting may be gained by correspondence, section 560.

Such knowledge may be gained in the course of business, section 561.

Value of the testimony—How affected by the means of knowledge, section 562.

Opinions, chapter XII.

Subdivision 10, sections 364, 366, 367, 380.

Identity—Speed of railroad trains, section 364.

Values—Sanity, section 366.

Same—As to sanity in will cases, section 367.

Physicians and surgeons, section 380.

Subdivision 11, sections 304, 307, 308, 317.

Matters of public and general interest, section 304.

Declarations as to pedigree—Reason for the exception—Declarant's relationship—How proved—Particular facts, section 317.

Reputation as to private boundaries excluded in England, section 307.

Relaxation of the rule in the United States, section 308.

Subdivision 12, sections 464-474, 472.

Usages of trade—Illustrations, section 464.

Same—Principal and agent, section 465.

Proof of usage—Bills of lading—Insurance, section 466.

Same—Contracts for services, section 467.

Proof of custom between landlord and tenant—Other contracts, section 468.

General requisites of usages—Must be reasonable, section 469.

The usage must be an established one, section 470.

The usage must be known, section 471.

The usage must be consistent with the contract, section 472.

Proof that the usage is general, section 473.

To admit parol proof the usage must be lawful, section 474.

Subdivision 13, section 320.

Acts and conduct of relatives admissible as well as declarations—Written declarations—Family recognition of writings and records, section 320.

Subdivision 15, chapter V.

Relevancy, chapter V.

Subdivision 16, sections 828-836.

Witness cannot be contradicted as to wholly irrelevant matter—Further illustrations—Reversible error, section 828.

Partiality of witness relevant—On that subject cross-examiner not concluded by answer, section 829.

Same—Further illustrations, section 830.

Contradicting the witness to prove bias, section 831.

Collateral questions—Judicial discretion, sections 832, 833.

Questions as to former conviction or indictment, section 834.

Same—Statutes, section 835.

Questions not affecting credibility, but merely tending to prejudice, inadmissible, section 836.

### **Evidence on Particular Subjects—Corporate Existence.**

If an indictment avers that the company is a corporation, proof of the existence of the corporation de facto will support the averment: *People v. Schwartz*, 32 Cal. 161.

A corporation defendant, in an action of trespass, may introduce in evidence its articles of incorporation to show that it was not incorporated till after the trespasses or some of them: *Berry v. San Francisco etc. R. R. Co.*, 50 Cal. 436.

**Evidence on Particular Subjects—Damage.**

Witness is not required to state reasons or grounds on which he estimates amount of damage to which he testifies before he can testify to such estimate. The party calling the witness may ask for such reasons or not as he may choose; they may be made the subject of cross-examination by the opposing counsel, in which great latitude should be allowed, but if opposing counsel fail to avail themselves of such cross-examination, they cannot object to the evidence that no grounds of the estimate were stated: *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848.

In an action for detention, against a carrier by a passenger, it was held that evidence that plaintiff was a good bookkeeper was admissible on question of damages, leaving the jury to estimate the probabilities of his getting employment during time lost by detention, etc.: *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

But where the action was to recover the value of plaintiff's services as agent of the defendant in the management of an estate in California, and plaintiff introduced two witnesses to prove the value of his services in going twice to Europe to negotiate the purchase of the estate, etc., but it was not shown that the plaintiff had gone at defendant's request, the evidence was held inadmissible: *Dopman v. Ho-berlin*, 5 Cal. 414.

In an action to recover for services as attorney in a suit, it was held not competent to prove the value of plaintiff's services in another action: *Hart v. Vidal*, 6 Cal. 56.

Evidence of reputation for skill of the plaintiff's physician is inadmissible in an action for personal injuries, unless defendants show in mitigation of damages that the plaintiff's injuries were wholly the result of improper treatment: *Thorne v. California Stage Co.*, 6 Cal. 233.

In an action of trover, it is not competent for defendant to show that the property, when sold by the sheriff, "brought full and fair auction prices," or to show what the property sold for at the sheriff's sale;



or that he was instructed by the attaching creditor to employ a competent auctioneer to make the sale, and that he obeyed such instruction: *Cassin v. Marshall*, 18 Cal. 689.

In an action where punitive damages are claimed on the ground of malice, either party is entitled to prove any facts or circumstances which tend in the slightest degree either to show malice or to rebut the presumption of malice: *Lyon v. Hancock*, 35 Cal. 372.

In an action for obstructing a stream, evidence by the plaintiffs to show that the irregularity of the flow of water was a material injury to them, as in consequence of such irregularity they lost their customers, who refused to purchase water from them, as admissible: *Natoma Water etc. Co. v. McCoy*, 23 Cal. 490.

Where the defendant justified the taking as sheriff and tax collector under an assessment, the court held that even if the assessment were absolutely void, and therefore insufficient to support the justification of the defendant, still it might have been very material as evidence for defendant for the purpose of showing the intention with which he acted, and enabling the jury to form a correct conclusion as to damages: *Dorsey v. Manlove*, 14 Cal. 554.

#### **Evidence on Particular Subjects—Fraud.**

Testimony showing a fraudulent design in a vendor of goods is admissible under the allegations of an answer charging that the sale was made to defraud creditors, although it does not connect the purchaser with the fraud, or show that he was cognizant of such fraudulent design: *Landecker v. Hough-taling*, 7 Cal. 391.

Evidence of dealing with property to-day as his own by the vendor is evidence to show that a sale of it a month ago was fraudulent: *Butler v. Collins*, 12 Cal. 465.

Statements of a vendor, whether made before or after the sale, are competent evidence to prove fraud as against him. Whether the statements of the vendor are evidence against the vendee depends on cir-

circumstances. If made before the sale is completed, they are evidence against the vendee: *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

On an issue of fraud, on the ground that a certain judgment confessed by B. to plaintiff was fraudulent as against the creditor of B., evidence that on the day of his confession of judgment to plaintiff, and in the same court, B. confessed other judgments—one to G. and another to F. and G.—the papers in the three cases being all prepared by the same attorneys, was held properly admitted to show that the confessions of the three judgments were in pursuance of a common purpose: *King v. Davis*, 34 Cal. 100.

#### **Evidence on Particular Subjects—Identity.**

When a record of a former judgment is admitted in evidence, parol testimony is also admissible to show the identity of the parties named in the record with those named in the pending action: *Garwood v. Garwood*, 29 Cal. 514.

Where an issue is raised as to the identity of the purchaser of certain property at a given sale a conversation that took place while the sale was being made, between the seller and other persons present, is admissible: *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811.

Evidence of a witness who testified that while he was an officer at the state prison at San Quentin the defendant was an inmate of the prison, and was known by the name of Frank Rollins among the officers, as well as upon the records of that institution, was sufficient to establish the identity of the defendant with the said Frank Rollins: *People v. Rolfe*, 61 Cal. 540.

The record of a marriage certificate showing that at a designated time and place one John Stokes and Rebecca Gibson were united in marriage by the minister making the certificate, together with the testimony of a witness that at the time and place mentioned in the certificate he was present when a marriage was celebrated by the minister named therein

between the defendant and one Rachael Gibson. Evidence that the defendant and Rachael Gibson had lived together avowedly as man and wife for many years was admissible as tending to identify the defendant and Rachael Gibson as the persons mentioned in the certificate: *People v. Stokes*, 71 Cal. 263, 12 Pac. 71.

For the purpose of identification of a defendant charged with robbery it may be shown that the witness identified one of the robbers as a man with whom he had a conversation prior to the robbery, at a certain place in the presence of the men identified, a certain place in the presence of another person, without knowing the name of the men identified, and evidence of the original conversation with the defendant, and of a subsequent conversation between the witness and the other person as to the name of the person identified, is admissible, and can be productive of no injury, where no statement or declaration testified to was touching the commission of the offense, and the witness positively identified the defendant at the trial as one of the active participants in the robbery: *People v. Clark*, 106 Cal. 32, 39 Pac. 55.

In a prosecution for adultery evidence that the real names of the parties married differed from the names given in the certificate is admissible: *People v. Stokes*, 71 Cal. 263, 12 Pac. 71.

Where the name of the plaintiff is not mentioned in the libel, the plaintiff may introduce witnesses to testify that they knew the parties, and were familiar with the relations existing between them immediately prior to and at the time of the publication; and that, on reading the publication, they understood the plaintiff to be the person referred to; and a subsequent publication by the defendant mentioning plaintiff's name is admissible to show that the former publication referred to the plaintiff: *Russell v. Kelly*, 44 Cal. 641; 13 Am. Rep. 169.

#### **Evidence on Particular Subjects—Intent.**

A witness may be asked as to intent with which he did certain act, where that intent is a material

thing in the action: *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50.

Upon question of intent with which document was destroyed, the acts of the agent who induced the other party to consent to such destruction are material, and a substituted contract given by him is pertinent although he had no authority to sign it: *Brock v. Pearson*, 87 Cal. 581, 25 Pac. 963.

Evidence of one party, purporting to declare intention of other party concerning the matter in controversy, is inadmissible: *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581.

In cases of fraud subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. Fraud being proven in reference to the transaction under question, the criminal intent is necessarily a matter of inference for the jury. The dealing with property to-day by the vendor as his property is evidence to show the fraud committed in a sale a month ago. The subsequent acts are illustrative of the intent and character of the first: *Butler v. Collins*, 12 Cal. 457.

Conversations between the members of the state board of equalization during the session in which the assessment was made are not admissible to show the intention of the board, or any of its members, or the signification to be given to the term "franchise" used in the assessment made by the board: *People v. C. P. R. R. Co.*, 105 Cal. 578, 38 Pac. 905.

Where the defendant testified that some days prior to the alleged assault the prosecuting witness said, "I'll fix you," and further testified that immediately prior to the affray the prosecuting witness, in a violent manner, said to him, "I'll kill you," and made demonstrations as if to draw a weapon, the refusal of the court to allow him to testify as to what he thought was meant by the words "I'll fix you," could not be prejudicial: *People v. Lynch*, 101 Cal. 229, 35 Pac. 860.

Evidence of conversations with the defendant as to the condition of the books, tending to show the methods and conduct of the defendant touching the

~~money~~ charged to have been embezzled, and touching discrepancies occurring in a previous year, tending to show a method so long continued as to preclude the supposition that the later ones were accidental or the result of negligence, is competent and admissible: *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

#### **Evidence on Particular Subjects—Malice.**

Plaintiff, to show malice, may introduce a docket and proceedings before a justice of the peace, and show what the defendants who had plaintiff arrested for assault with intent to kill there did and swore to: *Dreux v. Domec*, 18 Cal. 83.

#### **Evidence on Particular Subjects—Marriage and Illegitimacy.**

Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases: Civ. Code, 57.

Evidence on the part of the plaintiff that she had, long prior to any difficulty between herself and the defendant, shown to a third party what she alleged to have been a marriage contract between them, and which the defendant claimed to have been a forgery, was competent as tending to show its genuineness: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact: Civ. Code, 195.

#### **Evidence on Particular Subjects—Naturalization.**

Naturalization must be proved by record evidence, showing the action of the court, and cannot be proved by parol evidence of the party that he is a citizen, or has been naturalized: *Figg v. Hensley*, 52 Cal. 299.

#### **Evidence on Particular Subjects—Negligence.**

In an action against a steamboat, as a common carrier, for the loss of a horse by the explosion of the boiler, caused by racing, evidence on the part of the defense to show the good condition of the boiler,

and that extraordinary care was used, is irrelevant: *Agnew v. Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87.

In an action for damages for personal injuries received from falling in a passageway in a darkened condition in a boarding-house, it was held error to permit the plaintiff to prove, in chief, that another person had fallen and sustained injuries in the same passageway, when in the like darkened condition: *Martinez v. Planel*, 36 Cal. 578; *Kidder v. Dunstable*, 11 Cal. 342; *Central Pac. R. R. Co. v. Pearson*, 35 Cal. 247; *Clark v. Willet*, 35 Cal. 534; *People v. Taylor*, 36 Cal. 255.

In an action for injuries to a child, evidence that it was the daily practice of the defendant's cars to run along without a driver, and that this fact induced a practice among children to run along with the cars and get upon the platform, was held immaterial, as on the occasion when the plaintiff's son was killed the car was not running without a driver: *Largan v. Central R. R. Co.*, 40 Cal. 274.

In an action against an attorney for negligence, evidence of another attorney that, upon the facts admitted or proved, the attorney was guilty of negligence, is admissible: *Gambert v. Hart*, 44 Cal. 543.

In an action for damages, resulting from the death of a parent and husband, caused by the wrongful act or negligence of the defendant, evidence as to the business, education, and habits of sobriety and economy of the deceased is admissible: *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 324.

In an action to recover the value of buildings and timber destroyed by fire through negligence, evidence as to the cost of new buildings and the character of the timber is admissible: *Cleland v. Thornton*, 43 Cal. 437.

#### **Evidence on Particular Subjects—Ownership.**

As tending to show that a particular business was conducted by a deceased person ostensibly for himself and in his name, and not for or in the name of another, evidence that the goods used in the business were sold to him in his own name and charged to

him individually is admissible: *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. 467.

Evidence that person acquired possession of and leased land to another tends to show that he is owner of it: *Hobbs v. Duff*, 43 Cal. 485.

Evidence that certain persons controlled or superintended real estate is admissible for the purpose of showing that such persons in equity own it, although the legal title stands in another: *Hobbs v. Duff*, 43 Cal. 487.

Evidence of pecuniary standing and ability of person is competent on an issue as to whether he is in equity the owner of the land the title to which has been taken in his name: *Hobbs v. Duff*, 43 Cal. 487.

Evidence of general reputation as to ownership is inadmissible to prove title to land: *Berniaud v. Beecher*, 76 Cal. 394, 18 Pac. 598.

Question "Who owned it?" (the land in dispute) is not proper, as the determination of the main question in issue cannot be transferred to a witness: *David v. Baugh*, 59 Cal. 568, 578.

In a suit involving a title to land, "To whom has the lot in dispute been assessed, and who has paid taxes on it since 1876?" is properly overruled: *Davis v. Baugh*, 59 Cal. 568.

Question, "Who has claimed possession of that property [the property in suit] since 1862 or 1863?" is improper, the question not being limited to claims by the parties to the action, nor to claims connected with acts of possession and constituting a part of the *res gestae*: *Davis v. Baugh*, 59 Cal. 578.

When an issue is raised as to whether a person, since deceased, during his lifetime asserted title to land, evidence may be introduced by those claiming under such person that during his lifetime he performed work on the land: *Lick v. Diaz*, 44 Cal. 479.

Where one admitted he acquired his interest in certain company mining claims by purchase, which admission was not withdrawn, evidence that he had acted as a member of the company, that the company had recognized him as a member and owner of said interest, and that he had paid assessments

to the company thereon, was irrelevant and incompetent to prove title to said interest in him: *King v. Randlett*, 33 Cal. 318.

In an action of claim and delivery of personal property, the books of account of a third person, not a party to the suit, are inadmissible to prove the ownership to the property: *Watrous v. Cunningham*, 65 Cal. 410, 4 Pac. 408.

When the plaintiff in replevin claims title to a harvested crop by purchase, and a part of the consideration of the sale consisted of certain notes and a chattel mortgage upon the growing crop, such notes and mortgages are admissible in evidence in his favor in deraigning his title to the crop: *Byrnes v. Hatch*, 77 Cal. 241, 19 Pac. 482.

In an action for the recovery of real estate a contract in writing, signed by both plaintiff and defendant, for the sale and conveyance of the land in dispute by plaintiff to defendant, is admissible in evidence on behalf of plaintiff, for the purpose of proving that defendant obtained possession of the premises from plaintiff, and went in under him: *Frisbe v. Price*, 27 Cal. 253.

A statement of property for taxation rendered to the assessor is admissible as evidence of what property was then claimed by the party making the statement: *Woolridge v. Boardman*, 115 Cal. 74, 46 Pac. 868.

In an action by a divorced wife against the administrator of the estate of her deceased husband to recover the possession of certain land which was formerly community property, and on which the husband during the marriage had filed a declaration of homestead, the judgment-roll in the action of divorce setting aside the land to the husband, together with a stipulation filed therein authorizing such disposition, and the will of the husband devising the land to third persons, are admissible in evidence under the general issue: *Stockton v. Knock*, 73 Cal. 425, 15 Pac. 51.

A complaint in an action for seizure, etc., of goods, which avers that the defendant took and carried



away certain goods, etc., of and belonging to the said plaintiffs, is sustained by proof that the plaintiffs owned the property as partners or tenants in common, and that their respective interests therein were very unequal: *Pelberg v. Gorham*, 23 Cal. 349.

If parties go to issue upon general averments and denials of title, anything that legally supports or attacks the title is admissible: *Kimball v. Gearhart*, 12 Cal. 50; *Roberts v. Chan Tin Pen*, 23 Cal. 264.

The mere production of a deed from a stranger is not sufficient to show either that he had title, or that the grantee entered under or holds in subordination to the deed: *Woodbeck v. Wilders*, 18 Cal. 136.

A witness cannot testify respecting a title, whether it was good or bad, where it is the question to be passed upon: *Winter v. Stock*, 29 Cal. 412, 89 Am. Dec. 57.

#### **Evidence on Particular Subjects—Value.**

In determining the real value of the land sold the jury are not confined to evidence of what it would have brought at a forced sale for cash, at public auction, and the court may admit evidence showing the terms of credit upon which tracts of land in the region of the land in question were usually sold, and what was its fair market value at the time of the private sale, the question before the jury being as to the difference between the amount for which it was sold and its fair market value at that time: *Montgomery v. Sayre*, 100 Cal. 182, 38 Am. St. Rep. 271, 34 Pac. 646.

Evidence of value for short periods, before and after the date in question, may be allowed in the discretion of the court, where such discretion is not abused: *Montgomery v. Sayre*, 100 Cal. 182, 38 Am. St. Rep. 271, 34 Pac. 646.

The owner of land sought to be taken for public use is entitled to the market value of the land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally, and it is therefore proper to consider for what purpose it is most valuable. Any existing facts

which enter into the value of the land in the public and general estimation, and tending to influence the minds of sellers and buyers, may be considered: *Spring Valley W. W. v. Drinkhouse*, 82 Cal. 528, 28 Pac. 681.

The general rule, in estimating the market value of property, is that it is not competent for the owner to prove what he has been offered for the property, or what persons looking for similar property were willing to give for it, and in no case can bona fide offers for the property afford any test of value when not confined to a period near the time at which the value is to be ascertained: *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224.

In an action for a breach of contract in not delivering goods sold at the time agreed upon, evidence of the buyer as to the price agreed upon between himself and third persons, to whom he had contracted to resell the goods, is incompetent to establish their market value: *Ramish v. Kirschbraun*, 90 Cal. 581, 27 Pac. 433.

For the purpose of determining the value of the property at the place of detention—and where, also, delivery should have been made—evidence is admissible of its value at the place of market, and cost of transportation thither, and the usual expenses of sale: *Hisler v. Carr*, 34 Cal. 641.

If answer in replevin admits value of property averred in the complaint, evidence should not be admitted as to its value: *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

In determining what was the value of the property at the time of the conversation, evidence is admissible of the cost of the property, not as showing the value conclusively, but as a circumstance to aid in arriving at the value at the time in question: *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729.

Where the work, so far as performed, has been performed in accordance with the specifications of the special contract, such contract may ordinarily be introduced as evidence of value; but whether in the present case the contract is so admissible is not decided: *Cox v. McLaughlin*, 54 Cal. 605.

Where a variance has occurred in the performance of a specific contract, under such circumstances as still enable a plaintiff to maintain an action on the implied promise to pay the reasonable value of the work actually done, and the contract, so far as it has been performed in accordance with the specifications therein contained, the contract may ordinarily be introduced as evidence of value: *Cox v. McLaughlin*, 52 Cal. 590.

In assumpsit for breach of a special contract for work and labor, the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion: *Reynolds v. Jourdan*, 6 Cal. 108.

Although an executor or administrator is chargeable with the whole of the estate of the decedent which may have come into his possession at the value of the appraisement contained in the inventory, unless he shall exonerate himself as provided by the statute, the inventory is only prima facie evidence of the value of the estate specifically described therein, and is not admissible as evidence against the executor or administrator of the value of a tract of land not therein specifically described or valued, though it is part of an entire tract which has a specific description and valuation: *Wheeler v. Bolton*, 92 Cal. 159, 28 Pac. 558.

A question put to one of the tenants as to what the leasehold was worth to them, if erroneous, is harmless, if the author plainly indicates that the value of which he testified was the market value: *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114.

Upon the issue as to the value of the property, it is proper to consider its cost as a circumstance tending to show value, and evidence of such cost is admissible: *Greenbaum v. Taylor*, 102 Cal. 624, 36 Pac. 957.

Where the owner prevents a building contractor from completing his contract, and the contractor sues to recover the value of the work performed and materials furnished, the building contract is admissible in evidence as proof of the value of the material furnished and services rendered, but is by no means conclusive on that point, and is to be taken with the other evidence in arriving at such value: *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640.

Where a witness had testified that the land was worth a certain sum before the digging and scraping by the canal company, and that it was not worth anything afterward, it is not prejudicial error for the court to allow the plaintiff to ask the witness whether or not he would give as much for the land after the digging and scraping as he would have given before: *Williams v. Fresno Canal etc. Co.*, 96 Cal. 14, 31 Am. St. Rep. 172, 30 Pac. 961.

The assessment of property for taxation is not admissible as evidence of its value in condemnation proceedings: *San Jose etc. R. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522.

The signing of an assessment list by the defendant, with a valuation attached to the property, is not a declaration by him as to the value of the land: *San Jose etc. R. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522.

In action by a bookkeeper for value of his services, the books kept by the plaintiff are admissible in evidence for the defendant upon the issue as to the value of the plaintiff's services. Defendant may also, upon the issue as to the value of the plaintiff's services, show by another bookkeeper, who has examined such books, that they were not complicated, but a simple set of books to keep, and could be kept by any person of ordinary skill in bookkeeping: *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700.

In an action to recover the value of services, and work and labor performed under a contract, the plaintiff has the right to prove the value of the services of an assistant employed by him, and who performed the same work plaintiff contracted to do, unless it appears by the nature or terms of the employment that

the services of a particular person were contracted for, and that no other person could, under the contract, fill the place of the employee: *Leet v. Wilson*, 24 Cal. 399.

An instruction that when a servant has been employed at a stated rate of wages, in a hotel in another state, and the hotel business has been broken up and closed, and the servant paid up and discharged, and two months afterward the same servant comes and resides with her former employer, as a house servant on a farm, this is not evidence of a continuing contract of hiring at the former rate of wages, was held proper: *Reed v. Swift*, 4 Cal. 26.

Evidence of a special contract to pay a sum certain for services may be received upon a complaint upon a quantum meruit, as tending to show the value of the services: *Friermuth v. Friermuth*, 46 Cal. 42.

In an action by a physician, etc., for attendance on persons wounded in a railroad collision and placed in a private hospital, evidence on behalf of defendant of the usual and customary charge in this state for necessary medical attendance, etc., upon patients in hospitals received for treatment of wounds is irrelevant: *Trenor v. Central Pac. R. R. Co.*, 50 Cal. 222.

#### **Declarant Must not be Asleep or Insane.**

Words uttered by one while asleep are not admissible in evidence against him: *People v. Robinson*, 19 Cal. 40.

Nor utterances of an insane person: *People v. Wreden*, 59 Cal. 392.

#### **Admissions in Open Court.**

Where one of the issues was the condition of the goods (hops) in question when they left New York, and defendant had admitted on the trial that "if merchantable when they left New York, he made no claim," held, that he was concluded by this admission: *Burritt v. Gibson*, 3 Cal. 396.

When it appears from the whole conduct of a cause that a particular fact is admitted between the parties, the jury have a right to draw the same conclu-

sion, as to that fact, as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record: *Powell v. Oullahan*, 14 Cal. 114.

### **Admissions in Pleadings.**

Where a party has been named in a complaint as a party defendant, but not served, his testimony as to the admissions of the other defendants who have been served is hearsay and inadmissible: *Derby v. Rounds*, 53 Cal. 659.

Where there are several answers, an admission made in one is not available in proof of issues raised by others: *Nudd v. Thompson*, 34 Cal. 39.

Although a party is bound by the admissions contained in his pleadings, yet it is only the admissions in the pleadings upon which he goes to trial: *Mecham v. McKay*, 37 Cal. 154.

If a defendant, in his answer, admits a material allegation in a complaint, he is afterward precluded from contesting it: *Howard v. Throckmorton*, 48 Cal. 482.

When it is admitted by the pleadings that a promissory note in suit given to a married woman was assigned by the payee to the plaintiffs, the question cannot be raised on the trial whether the assignment was made in such form as to pass the interest of a married woman: *Hellman v. Howard*, 44 Cal. 101.

Evidence is not admissible to convert facts admitted by the pleadings: *Patterson v. Sharp*, 41 Cal. 133.

Plaintiff need not prove facts alleged in the complaint which are admitted in the answer: *Jones v. Spears*, 47 Cal. 20.

It is not error to exclude evidence to prove facts which are admitted by the answer: *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297; *Hurlburt v. Jones*, 25 Cal. 225.

It is error to admit evidence to contradict admissions in the pleadings if a proper objection be interposed: *Turner v. White*, 73 Cal. 299, 14 Pac. 794.

An averment in the complaint that the court had decided certain facts in the former action carries with it the admission that the decision was sustained

by sufficient evidence to support it, and precludes evidence for the plaintiff to prove the contrary; nor is the effect of such admission qualified or controlled by an averment in the complaint of the contrary fact sought to be proved: *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, 30 Pac. 1108.

All evidence contrary to admissions of pleadings should be disregarded, the admissions being binding on the party making them: *Hall v. Polack*, 42 Cal. 218.

If the complaint in an action against husband and wife to foreclose a mortgage executed by the husband alone avers that the mortgager, at the time of its execution, owned the land described in the mortgage as a tenant in common with another person, each owning an undivided one-half, and the defendants, in their answers, admit this allegation, but set up as an affirmative defense a claim to a homestead, evidence to show a parol partition prior to the execution of the mortgage is irrelevant: *Elias v. Verdugo*, 27 Cal. 418.

Where, in an action of ejectment, the defendant claimed title under a tax sale, and to prove an admission of title in him by plaintiff offered in evidence a complaint in an action by the plaintiff against a third person, in which it was averred that in consequence of the neglect of the plaintiff's agent the premises were sold for taxes and no redemption was made, and that the sale thereby became absolute, in consequence of which neglect of the agent the plaintiff had sustained damage, held, that the complaint was inadmissible for that purpose; that the statements in it did not amount to an admission of title, and that, even if they did, the admission would not operate to transfer such title: *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

In an action on a promissory note, evidence is inadmissible to show that the plaintiff is not the owner of the note when his ownership is admitted by the pleadings: *Braly v. Henry*, 77 Cal. 324, 19 Pac. 529.

A petition for letters of administration is a pleading, and the rules in regard to admissions in pleadings apply to it: *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

If the answer admits that services were rendered by plaintiff's assignor as attorney for the defendants in separate actions brought in their separate names, and there is evidence to show the value of the services, a prima facie case was made against the defendants for the recovery of a reasonable compensation, and the burden was upon them to meet it: *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198.

Where the complaint upon foreclosure of the liens upon the remodeled building describes it as situated upon the entire lot, and its allegation in that respect is not denied, no issue is raised as to whether or not the lien covers an entire building or only a part thereof, and the defendant cannot introduce evidence against his admissions: *Brunner v. Marks*, 98 Cal. 374, 33 Pac. 265.

In an action to foreclose a laborer's lien, the answer set up a written contract substantially the same as that alleged in the complaint, except that it provided that the work was to be paid for by a conveyance of land, but admitted the value of the work to be performed, the plaintiff is entitled to rely upon the admission of the answer; and a denial in the answer that any sum was due the contractor upon the completion of the work, pursuant to the contract or otherwise, must be treated as a denial only that any sum was due under the contract; and the failure of the plaintiff to offer evidence as to the terms of the contract between the owner and contractor, or that there was any contract between them, does not entitle the owner to a nonsuit: *Schmid v. Busch*, 97 Cal. 184, 31 Pac. 893.

The general rule that an entire admission is to be taken together, in order to enable the court or jury to judge of its true extent, does not extend to receiving the whole of what was said by the party making the admission, but only such other or further part of what was said as would in any way explain or qualify the part first given in evidence; and this is the true rule applicable to admissions in pleadings under our codes: *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269.



In an action on a promissory note, an admission in a separate defense by failure therein to deny the non-payment of the note is not available by the plaintiff in proof of the issue as to nonpayment raised by the general denial: *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773.

A fact alleged in the complaint, and not denied by the answer, becomes an admitted fact in the case: *Merguire v. O'Donnell*, 103 Cal. 50, 36 Pac. 1033.

An admission or averment in a verified answer, in a separate and distinct defense, as to the fact that the defendant was a consolidated corporation, is not evidence against the defendant upon issues tendered in other defenses contained in the same answer, consisting of denials only: *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 206, 35 Pac. 643, 646.

Where the complaint alleges that the defendant was the owner of a specified number of shares of stock in the bank at all the times mentioned therein, and this allegation is not denied in the answer, the ownership of such stock when the debts in suit were contracted is admitted, and no evidence thereof is required: *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 42 Pac. 418.

A plaintiff may read the complaint and answer in evidence, so as to show the admissions made by defendant by not denying allegations therein: *Garfield v. Knight's Ferry etc. Water Co.*, 14 Cal. 36.

A jury should not give a verdict in plaintiff's favor for more than the plaintiff, in rendering his account, demanded. The plaintiff, by asking an amount, admits that it is sufficient: *Harrison v. Peabody*, 34 Cal. 180.

### **Pleadings as Evidence.**

A joint answer by two defendants in an action, verified by one only, is not admissible as evidence against the other in another action: *McDermott v. Mitchell*, 47 Cal. 251.

Where the action is brought in the name of and for the benefit of a party by his duly authorized attorney in fact, and is being prosecuted with his knowledge

and consent, he is presumed to know these facts and to have assented thereto; and the complaint therein, although not signed or verified by him, is evidence against him of the fact of suit brought and of the nature of the action: *Kamm v. Bank of California*, 47 Cal. 191, 15 Pac. 765.

In an action for mesne profits plaintiff offered in evidence the record of an action by defendant against a third person, for the use and occupation of the same premises for a time prior to the time sued for in this action, in which defendant under oath fixed the value at a certain sum, together with evidence that the value of the use and occupation was as great in the one case as the other. Held, that the evidence was admissible as a solemn admission by a party to the record in relation to a particular fact; that such admissions are not irrelevant, whether made directly or incidentally: *Shafter v. Richards*, 14 Cal. 125.

A party who sues two persons as partners, one of whom answers, denying the partnership, cannot, to prove the partnership as against the defendant denying it, introduce in evidence an answer of the defendant admitting the partnership, filed in another case between the two defendants: *Etchmende v. Stearns*, 44 Cal. 582.

The plaintiffs, in their second amended complaint, averred that they were, and always had been, ready and willing to pay over to the parties entitled thereto the money due upon the wheat, and offered to pay the money into court; and on the trial, for the purpose of showing their offer to fulfill the contract, introduced in evidence the original complaint containing such offer, and followed it by evidence that they had paid the money into court. Held, that the evidence was admissible: *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369.

An unverified complaint signed alone by the attorney of plaintiff, without proving that the plaintiff had any notice of its contents, is not admissible against the plaintiff as evidence of his admission of facts stated therein, or to contradict his testimony to the contrary on the trial of another case: *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004.

Where unverified answers in a former action are offered in evidence as admissions of the defendants, and are objected to generally as incompetent, irrelevant and immaterial, and as not being in rebuttal, it cannot be urged on appeal for the first time that the proper foundation had not been laid for the admissions by proof that the facts stated in the answers were inserted with the knowledge of the defendants: *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271.

Complaint not signed or verified by the plaintiff, but verified by his attorney in fact, is admissible in evidence against the plaintiff of the fact that the prior action had been brought, and of its nature: *Kamm v. Bank of California*, 74 Cal. 191, 15 Pac. 765.

Material allegations of complaint in suit against prior administrator must be taken as admissions of the truth of the matters so alleged against the same plaintiff in a subsequent action against the administrator *de bonis non* of the same estate, for the same cause of action, and will be binding, and conclusive upon him in the absence of any evidence tending to establish that such allegations were made by mistake or under misapprehension of the real facts: *Geary v. Simmons*, 39 Cal. 224.

An answer under our statute is not proof for defendant, but an admission, in the answer of a fact stated in the complaint is conclusive evidence against him: *Blankman v. Vallejo*, 15 Cal. 638.

Answer responsive to and denying charges in bill of equity is not evidence for the defendant, though the bill be sustained by one witness only: *Goodwin v. Hammond*, 13 Cal. 168, 73 Am. Dec. 574.

Joint answer of two defendants, signed by their attorney, and verified by only one of them, is not admissible in evidence for the purpose of proving the allegation therein contained in an action brought against the defendant who did not sign or verify: *McDermott v. Mitchell*, 47 Cal. 249.

Equity rule requiring two witnesses to controvert answer under oath does not prevail in this state. The answer is only a pleading, and is not evidence for defendant: *Bostic v. Love*, 16 Cal. 69.

For purposes of evidence no weight can be allowed to an affiant's denial based on the want of information or belief as to the facts denied: *Menke v. Lyndon*, 124 Cal. 160, 56 Pac. 883.

### **Admissions in Superseded Pleadings.**

Where an amended complaint is filed, the allegations of the original complaint are not admissible as evidence for or against the plaintiff: *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871.

A complaint, which has been superseded by an amended complaint, is not admissible in evidence on behalf of the defendant, on the trial of the cause in which it was filed: *Ponce v. McElvy*, 51 Cal. 222.

If an amended complaint is filed, the original ceases to be a pleading, and its averments cannot be used to disprove those of the amended pleading. But when a plaintiff is a witness at the trial, the averments of the original complaint, inconsistent with his testimony, may be introduced upon cross-examination, for the purpose of impeachment: *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625.

In an action, the original answer of the defendant, after being superseded by an amended answer, is not admissible in evidence on behalf of the plaintiff. By *Sharpstein, J., Paterson, J., and Searls, C. J., concurring*: *Sfern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579.

If an answer had been superseded by an amended answer the answer thus superseded is not admissible in evidence as an admission on the trial: *Mecham v. McKay*, 37 Cal. 154.

A pleading in a prior action between the same parties, although superseded by an amendment, is admissible in evidence in a subsequent action against the party filing it as an admission made by him: *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359.

An original answer containing an admission of an agency to execute a mortgage sought to be foreclosed by the plaintiff, and disclosing a ratification of the mortgage by the defendant, is superseded by an amended answer omitting all the averments on the subject of such agency and ratification, and the su-

perseded answer cannot be used as evidence in the cause tending to show such agency or ratification, nor can its declarations be considered by the court: *Ralphs v. Hensler*, 114 Cal. 196, 45 Pac. 1062.

The fact that the original answer is superseded by an amended answer as a pleading furnishes no valid ground for rejecting proof of its statements for purposes of impeachment, when they are plainly contradictory of evidence given by the party who verified the original answer: *Estate of O'Connor*, 118 Cal. 69, 50 Pac. 4.

When the original pleading has been superseded by an amended pleading, it is not admissible in the same action as evidence on behalf of the opposite party: *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625; *Stern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579.

When plaintiff is a witness, averments of the original complaint, inconsistent with his testimony, may be introduced upon cross-examination for the purpose of impeachment: *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625.

A pleading in a prior action between the same parties, although superseded by an amendment, is admissible in evidence in a subsequent action against the party filing it as an admission made by him: *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359.

#### **Pleadings as Evidence—Admitting Due Execution.**

The effect of an admission of the genuineness and due execution of a tax deed pleaded by the defendant, and not denied by affidavit of the plaintiff, as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and, whether it is proven or its execution admitted, its terms and legal effect are to be construed by the court: *Carpenter v. Shinnars*, 108 Cal. 359, 41 Pac. 473.

**Admissions for Purposes of a Particular Proceeding.**

Admissions made for the purpose of submitting to arbitration matters of difference between certain parties, in order to dispense with proof of the facts admitted, cannot be received in evidence in a collateral action between the same parties: *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

Admissions of fact by counsel in one action, whether made during the hearing of the evidence or upon the argument, are not admissible in evidence against the client in another action: *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

**Confession Defined.**

A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence merely because it may, when connected with other facts, tend to establish guilt: *People v. Velarde*, 59 Cal. 475.

A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime to another of the agency or participation he had in the same. The word "confession" is not the mere equivalent of the word "statement" or "declaration": *People v. Strong*, 30 Cal. 151.

**Confessions—What are not Voluntary.**

The confession of a party, made to a sheriff arresting him for grand larceny, after being told by the officer that it was useless to deny taking the property, that there was evidence to convict him, and that it would go lighter with him to confess, is not a voluntary confession, and cannot be properly given in evidence: *People v. Johnson*, 41 Cal. 452.

When the defendant seeks to find out from the sheriff whether a confession would be better for him, and makes a confession, induced by the advice of the sheriff that it would be better for him to make a full disclosure, such confession is not voluntary or admissible in evidence: *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

A confession of crime made to one in authority, upon a promise to the accused that it will be better for him to make a full disclosure, is not admissible in evidence upon the trial of the accused, because it is not voluntary: *People v. Barric*, 49 Cal. 342.

Confessions of a defendant indicted for larceny made to the prosecutor and owner of the property stolen, upon inducements held out by him that if defendant would disclose his confederates, he would use his influence to get defendant acquitted, are not admissible in evidence against him: *People v. Smith*, 15 Cal. 408.

Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by persons in authority: *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

#### **Confessions—When Admissible.**

The ground of the rule excluding confessions obtained by threats from one charged with a crime is the possibility that the confession may be false, and it does not apply to a confession of the place where stolen property is concealed, when the finding of the property at the place indicated precludes the possibility of the confession being untrue: *People v. Ah Ki*, 20 Cal. 177.

A confession made to an officer who has the prisoner in custody, whether it appears to have been made voluntarily or not, is admissible if it was not induced by improper means: *People v. Long*, 43 Cal. 441.

Confession made by prisoner, under influence of liquor furnished him with the consent of the officer having him in charge, but not influenced by anything said to him by the officer, held, to be admissible in evidence: *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

Judgment will not be reversed for admitting evidence of accused's confessions, if the record does not disclose that they were not voluntary: *People v. Shem Ah Fook*, 64 Cal. 381, 1 Pac. 347.

When person charged with crime is arrested and held in custody more than twenty-four hours with-

out being taken before a magistrate, voluntary confessions made by him to the officer are not to be excluded as evidence, on the ground that he was illegally in custody after the twenty-four hours expired: *People v. Devine*, 46 Cal. 46.

#### **No Conviction on Confession Alone.**

A defendant cannot be convicted of crime on confessions alone: *People v. Thrall*, 50 Cal. 415.

#### **Offer of Compromise as Declaration Against Interest.**

The statute permitting evidence of a party's declarations against his interests, as, for instance, his admission of liability, an offer to settle may be evidence to prove liability. Such evidence is admissible only to substantiate other evidence as to liability: *Smith v. Whittier*, 95 Cal. 279, 296.

#### **Declarations in a Party's Own Favor.**

But, generally speaking, declarations of a party in his own favor are not admissible to strengthen his case: *Shamp v. White*, 106 Cal. 220, 39 Pac. 537; *Barclay v. Copeland*, 86 Cal. 483, 21 Pac. 1; *Whitney v. Durkin*, 48 Cal. 462.

Declarations made by vendee to an assessor that he was the owner of the land are not admissible in favor of the vendee: *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778.

The rule, as sometimes held, that the declarations of a party at the time of doing an act which is legal evidence are admissible as parts of the *res gestae*, cannot be so applied as to admit, as against third persons, declarations of a past act having the effect of criminating such third persons: *People v. Simonds*, 19 Cal. 275.

Declarations of a defendant in a criminal action made by himself in his own favor are not admissible: *People v. Dice*, 120 Cal. 189, 52 Pac. 477; *People v. Prather*, 120 Cal. 660; *People v. Chin Hane*, 108 Cal. 597, 53 Pac. 259.

Upon the trial of an action for slander in charging plaintiff in being interested in the larceny of cer-



tain cattle, entries of the plaintiff in his books, showing that he had put down therein the cattle he was charged to have stolen, as having been purchased by him, are not admissible in evidence in his favor, as a litigant is not permitted to strengthen his case by his own declarations, whether written or verbal: *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1.

A party's declarations, under this subdivision, may be used against him, but not for him; therefore, in an action to compel a conveyance, it is error to admit in evidence on behalf of the defendant letters written by himself to a third person for the purpose of explaining that he held the title as security for indebtedness due from the plaintiff, and to enable him to mortgage it therefor: *Hausman v. Hausling*, 78 Cal. 283, 20 Pac. 570.

#### **Admissions not Amounting to Confession.**

Declarations are admissible when not amounting to a confession: *People v. Eckman*, 72 Cal. 582, 14 Pac. 359:

A declaration made to a sheriff to the effect that the defendant would plead guilty voluntarily is admissible: *People v. Eckman*, 72 Cal. 582, 14 Pac. 359.

Similar declarations made by the defendant after arrest while in the sheriff's office: *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347.

Voluntary declarations made immediately after the occurrence are admissible: *People v. Hawes*, 98 Cal. 648, 33 Pac. 791; *People v. Brown*, 130 Cal. 591, 62 Pac. 1072; *People v. French*, 69 Cal. 169, 10 Pac. 378; or made before coroner's jury: *People v. Herbert*, 61 Cal. 544; *People v. Martinez*, 62 Cal. 278; or made before a grand jury: *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; or before a district attorney after arrest and before preliminary examination: *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; or made shortly after the assault: *People v. Arnet*, 129 Cal. 306, 11 Pac. 930; or declarations previously made by defendant while a witness in a civil case: *People v. Wieger*, 100 Cal. 352, 34 Pac. 826; or conversations had with other witnesses: *People v. Cuff*, 122 Cal. 589,

55 Pac. 407; or statements made to the sheriff after arrest: *People v. Rodundo*, 44 Cal. 538; or statements made to a coroner: *People v. Neary*, 104 Cal. 373, 37 Pac. 943; or evidence given by the defendant on his preliminary examination: *People v. Kelly*, 47 Cal. 125.

Admissions not amounting to confessions are admissible without proof that they were freely and voluntarily made: *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649; *People v. Young*, 102 Cal. 411, 36 Pac. 770; *People v. Miller*, 122 Cal. 84, 54 Pac. 523; *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141.

And, in any event, the objection that an admission is not made freely and not under fear or other improper inducements should be made to the introduction of the testimony: *People v. Rodriguez*, 10 Cal. 50.

A written confession is admissible even where made by defendant under great excitement: *People v. Cokahnour*, 120 Cal. 253, 52 Pac. 505.

Voluntary statements of defendant in a criminal action previously made as a witness on the trial of another action are admissible against him: *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106.

#### **Declarations Which have been Held Admissible as Evidence Against the Party Making Them.**

Statements contained in a draft of a chattel mortgage: *Wise v. Collins*, 121 Cal. 147, 53 Pac. 640.

Statements rendered to an assessor as evidence of what property was claimed by the party making the statement: *Woolridge v. Boardman*, 115 Cal. 74, 46 Pac. 868.

Declarations of a party engaged in the performance of an act illustrating its object: *Tait v. Hall*, 71 Cal. 149, 12 Pac. 391; *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 871, 39 Pac. 200.

Conversations tending to prove conditions upon which deed was made: *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3.

Declarations of a party to a deed made after execution of the deed as evidence that it was intended as a mortgage: *Ross v. Brusie*, 64 Cal. 245, 30 Pac. 811.

A declaration of a party after an accident that she was to blame: *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2; or that he did not blame anybody: *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981.

Declarations of a locator as to his object in commencing work at a particular point: *Draper v. Douglass*, 23 Cal. 347.

Letters written by a party tending to show that he claimed that nothing was due him: *Moore v. Campbell*, 72 Cal. 251, 13 Pac. 689.

Admissions contained in an offer of compromise which are not essential to the purpose of the compromise: *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658.

An admission by a party that a verdict was rendered against him at the previous trial was just: *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129.

Admission by a party as to the just amount of his demand: *Harrison v. Peabody*, 34 Cal. 178.

Declarations of a grantee while in possession of a deed, upon the question of the acceptance thereof: *Kidder v. Stevens*, 60 Cal. 414.

Declarations of a husband that money paid for property was separate property of his wife: *Moore v. Jones*, 63 Cal. 12.

Declarations of vendor of property as to object of moving it: *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

Admissions by one defendant are competent against him on trial of two defendants jointly: *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347.

Declarations of the defendant in a criminal action are admissible against him: *People v. Brown*, 130 Cal. 591, 62 Pac. 1072.

Admission of plaintiff injured while a passenger on a steamboat, at the time of the injury that he blamed no one but himself is admissible: *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981.

Admissions of a plaintiff as to the just amount of his demand in suit are admissible in evidence: *Harrison v. Peabody*, 34 Cal. 178.

It is competent to prove that, after a former trial of the cause, resulting in a verdict for a large sum against several defendants and in plaintiff's favor, one of the defendants admitted that the verdict was a just and righteous one, the evidence being at least pertinent and competent as against him: *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129.

A letter written from the defendant to the plaintiff's brother and received by him in due course of mail, relating directly to the claim upon which the action is based, is admissible against the defendant: *Ryland v. Heney*, 130 Cal. 426, 62 Pac. 616.

A letter from defendant intended for the plaintiff and referring to a letter received by defendant from plaintiff, which was by mistake of defendant's wife, acting as his secretary, misdirected to plaintiff's brother, is properly admitted in evidence against the defendant: *Ryland v. Hene*, 130 Cal. 426, 62 Pac. 616.

In an action upon a note, the consideration of which was assailed by one of the makers, evidence of the declarations of the plaintiff, made in the presence and hearing of both makers of the note, while counting out the money, that the plaintiff was loaning the money to them, is admissible in favor of the plaintiff: *Tibbet v. Tom Sue*, 125 Cal. 544, 58 Pac. 160.

The statement by the plaintiff that the accident was unavoidable, and that she did not blame the defendant or his driver, is an admission upon her part which she is at liberty to explain, and the jury are to determine the weight to be given to the admission, as well as the sufficiency of the explanation: *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2.

A referee appointed to take testimony in a cause may be called to prove what a witness said on the voir dire before the referee: *Hobbs v. Duff*, 43 Cal. 485.

On the second trial of a cause the plaintiff may introduce the ipsissima verba of the testimony of the defendant given on a former trial, even if the defendant is present in court: *Lorenzana v. Camarillo*, 45 Cal. 125.

A conversation between person indicted for murder and his victim, while alive, held partly in Chinese and partly in English, may be proved, that part of it held in English by persons present who understood English only, and that part of it held in Chinese by persons present who understood Chinese, provided that both the accused and his victim understood both languages: *People v. Ah Wee*, 48 Cal. 236.

Of course the admissions as to which evidence is given must be as to relevant facts, sec. 1868; *People v. Bowen*, 49 Cal. 654.

A notary may testify that a woman acknowledged that her name signed to a document by her daughter was her (the woman's) signature: *Jansen v. McCahill*, 22 Cal. 565, 83 Am. Dec. 84.

Evidence copied from the books of the defendant in the presence of the defendant is admissible in evidence against him: *Keith v. Electrical Engineering Co.*, 136 Cal. 178, 181.

#### **Admission by Acquiescence.**

If a debtor does not object to an account within a reasonable time, his acquiescence will be taken as an admission that the amount is truly stated: *Terry v. Sickles*, 13 Cal. 427.

The rule that acquiescence in an account rendered by failing to make objections to it within a reasonable time makes it an account stated, does not apply when the account is rendered under a misapprehension: *Polhemus v. Heiman*, 50 Cal. 438.

A party is not bound, or held to admit as true, every statement made by his witnesses because he does not contradict them at the time: *Wilkins v. Stidger*, 22 Cal. 238, 83 Am. Dec. 64.

Admissions and confessions may be implied from the acquiescence of the party in the statements of others made in his presence when the circumstances are such as to afford an opportunity to act or speak, and would naturally call for some action or reply from men similarly situated: *People v. McCrea*, 32 Cal. 100; *People v. Estrada*, 49 Cal. 172.

And it makes no difference that the statements which call for a reply are made by a person who is incompetent to testify. The degree of credit due to such evidence of implied admissions is to be estimated by the jury, under the circumstances of each case: *People v. McCrea*, 32 Cal. 100.

#### **Declarations in Presence of Party.**

A declaration made by a third person to and in the presence of the parties engaged in a controversy, at the time of the doing of an act by one of them that becomes the subject of an action, is admissible in evidence: *Gillman v. Sigman*, 29 Cal. 637.

Where a plaintiff had testified that during a certain time she was the wife of the defendant, evidence of a statement by a third party, in her presence and hearing, during said time, that she, the plaintiff, desired to bring a suit against the defendant for breach of promise of marriage was competent and material: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

Statements of third persons made in presence of the defendant are admissible against him only to the extent that they are admitted by him to be correct, either by his words or conduct; and the conduct of the defendant is the gist of the inquiry, and the only matter to be considered by the jury. Such statements are, therefore, inadmissible, unless accompanied with proof of defendant's statements or conduct in response thereto: *People v. Ah Yute*, 54 Cal. 89.

In order to affect person by conversations or declarations made in his presence they must be made to him in such a manner as requires him to deny or, by his acquiescence, to admit, them: *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

The declarations of a wife, made in the presence of her husband, and not denied by him in a conversation relating to her separate property, are competent evidence in an action by the devisees of the husband involving her title to the property: *Ingersoll v. Truebody*, 40 Cal. 603.

Statements made to the prisoner in respect to his connection with the alleged offense are admissible to

show his conduct when the statements were made, but not as evidence of the truth of the statements: *People v. Ah Yute*, 53 Cal. 613.

Statements made after the commission of a crime, in the presence of one charged with it, as to the circumstances attending its commission, do not of themselves prove the circumstances narrated, but are evidence only to the extent that they are admitted by the person charged, either by his express assent or by his silence: *People v. Estrado*, 49 Cal. 171.

When such statements are called for by the attorney for the prosecution, the question is not objectionable as irrelevant or incompetent, but counsel may ask for instructions to the jury, limiting their effect: *People v. Estrado*, 49 Cal. 171.

In such case the statement made by the defendant on trial, at the same time, is also admissible in evidence, in order that the jury may compare the two: *People v. Estrado*, 49 Cal. 171.

Admissions and confessions of guilt may be implied from the acquiescence of the party to whom they are made in the statements of others made in his presence. It makes no difference that the statements which call for a reply are made by a party who is incompetent to testify: *People v. McCrea*, 32 Cal. 98.

Such statements are admitted in evidence, not as themselves evidence of the truth of the facts stated, but to show the conduct of the defendant under the circumstances: *People v. McCrea*, 32 Cal. 98.

If declarations are offered in evidence as against a person in whose presence they were made, and there is evidence tending to show that such person heard and understood them, it is for the jury to decide whether he understood them: *People v. Chin Mook Sow*, 51 Cal. 597.

In a prosecution for larceny, evidence as to acts of another person, committed in the presence of the defendant, and showing a connection between them, are admissible, although no conspiracy between them to steal has been shown: *People v. Wilson*, 66 Cal. 370, 5 Pac. 624.

Declarations of third persons, made in the presence of a party are admissible as evidence against him: *People v. Piggott*, 126 Cal. 509, 59 Pac. 31; *Gilman v. Sigman*, 29 Cal. 637; *Ingersoll v. Truebody*, 10 Cal. 603; *Tibbett v. Tom Sue*, 125 Cal. 544, 58 Pac. 160; *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658; *People v. Murphy*, 45 Cal. 137.

They are admissible, not as evidence of the truth of the facts stated, but to show the conduct of the party under the circumstances: *People v. McCrea*, 32 Cal. 98; *People v. Estrado*, 49 Cal. 171; *People v. Ah Yute*, 53 Cal. 613.

Such statements are evidence only to the extent that they are admitted for the purpose charged, either by his express assent or by his silence: *People v. Estrado*, 49 Cal. 171; *People v. Ah Yute*, 54 Cal. 89.

And they are therefore inadmissible, unless accompanied with proof of his statement of conduct in regard thereto: *People v. Ah Yute*, 54 Cal. 89.

And the defendant cannot be prejudiced by evidence of declarations made in his presence where he denies them at the time: *People v. Piggott*, 126 Cal. 509, 59 Pac. 31.

It is for the party offering the declaration of third persons to show their admissibility by showing the defendant and circumstances under which they were made: *Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326.

In order to affect a person by conversations or declarations made in his presence, they must be made in such a manner as requires him to deny, or by his acquiescence admit, them: *Williams v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

And it makes no difference if the statements which call for a reply are made by a party who is incompetent to testify: *People v. McCrea*, 32 Cal. 98.

As declarations made by a wife relating to her separate property made in the presence of her husband bind him: *Ingersoll v. Truebody*, 40 Cal. 603.

It must appear that the party understood the language in which the conversation was had: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.



And also the witness who testifies so a shorthand reporter, who takes his notes from the interpreter, cannot testify from his notes as to the language of the witness; the interpreter, or some one who heard and understood the language, should have been called: *People v. Ah. Yute*, 56 Cal. 119.

Admission of fact made by a defendant's counsel for the purposes of the trial in a criminal case, in open court and in the defendant's presence, and not objected to by him, and recorded by the court, may be read in evidence against him on the trial: *People v. Garcia*, 25 Cal. 531.

Statements made by a third person in the presence of the defendant, and to which the defendant replied, are not hearsay, and are admissible against him: *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

**Declarations in Absence of the Party Affected are not Admissible.**

Declarations not made in the presence of the party sought to be charged are inadmissible: *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110; *Thaxter v. Inglis*, 121 Cal. 593, 54 Pac. 86; *Whitney v. Durkin*, 48 Cal. 463; *Schultz v. McLane*, 76 Cal. 608, 18 Pac. 775; *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380; *People v. Gonzales*, 71 Cal. 569, 12 Pac. 783; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899; *Chapman v. Neary*, 115 Cal. 79, 46 Pac. 867.

The attorney of the defendant cannot be permitted to testify to statements made to him by the defendant in the absence of the plaintiffs. Such declarations are self-serving and inadmissible: *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380.

The declarations of a party to his counsel before suit brought, not made in the presence of the opposite party, are not admissible in evidence in his behalf, for the purpose of showing that the statement thus made was the same as that made by him as a witness upon the stand: *Schultz v. McLean*, 76 Cal. 608, 18 Pac. 775.

Evidence of declarations descriptive of homicide made in the absence of the defendant by a person who

was present at the killing is hearsay: *People v. Gonzalez*, 71 Cal. 569, 12 Pac. 783.

Evidence of transactions and conversations between the defendant and his attorney in the absence and without the knowledge of the plaintiff, is inadmissible against the plaintiff: *Chapman v. Neary*, 115 Cal. 79, 46 Pac. 867.

The statements of a party made without the hearing or knowledge of his adversary are not competent evidence in his own behalf to prove the facts stated: *Rogers v. Schulenburg*, 111 Cal. 281, 46 Pac. 899.

In an action brought by a vendee for the specific performance of a written contract for the sale of land, declarations made by the plaintiff to the assessor at the time the land in question was assessed, and in the absence of the defendants, to the effect that he was the owner of the land, are not admissible in support of his claim to the adverse possession thereof, or to show that the assessment was made to him: *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778.

A question as to whether a witness for the prosecution, after leaving the accused and while holding a conversation with a third party, heard a pistol shot, and exclaimed immediately that defendant had killed the deceased, is irrelevant and incompetent; and if the witness denies such declaration it is incompetent to prove the declaration by another witness, or to prove that he made any remark indicating that he heard the shot that killed the deceased: *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

Upon a trial for slander in uttering a false charge of theft, evidence offered by the defendant to show that a third person had represented to the defendant that he had lost money from his pocket while the plaintiff was in the employ of the defendant, without any offer to show that such person had in fact lost any money, is hearsay, and inadmissible: *Harris v. Zanne*, 93 Cal. 59, 28 Pac. 845.

Statements made by the defendant's brother, not in the presence, however, of the defendant himself, are not admissible in evidence against the defendant: *People v. Warren*, 134 Cal. 202, 204.

**Entries in Family Bibles.**

A family Bible is admissible in evidence upon the question of the age of a child; and where the condition of the entry of birth requires explanation, the entry and explanation are properly submitted to the jury, and will not be considered upon appeal, especially where the positive testimony of the parents as to the age of the child is sufficient independently of the family record: *People v. Slater*, 119 Cal. 620, 51 Pac. 957.

Entries made in the family Bible are admissible to show the name of a child and the date of its birth, and the admissibility of the book does not depend upon proof of handwriting or authorship of the entries, but upon the fact that they are to be taken as assented to by the family in whose custody the book has been; and it is admissible upon mere proof that it is the family Bible, and such proof may be given by the mother, notwithstanding the entries are in the English language, in which she can neither read or write: *People v. Ratz*, 115 Cal. 132, 46 Pac. 915.

Where the mother of a girl is in court, and has testified to her age, an entry made by the mother in a Bible of the date of the girl's birth is not admissible as substantive evidence of that fact; such testimony is, in its nature, hearsay evidence and subject to the general rule by which that class of evidence is governed, viz., that the fact sought to be established cannot be otherwise shown, and is incompetent to establish any fact which is susceptible of being proved by witnesses who speak from their own knowledge: *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

Although the age of the female child was involved in the issue to be tried, that fact did not constitute it a case of pedigree in which her age could be proved by the written declaration of a third person: *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

In cases of pedigree it must be shown that the person who made the entry in the family Bible is dead, before the evidence will be admissible. Besides, al-

though the age of a female child was involved in the issue to be tried, that fact did not constitute it a case of pedigree in which her age could be proved by the written declaration of a third person: *People v. Mayne*, 118 Cal. 516, 519. •

### **Declarations in a Will.**

Declarations made by the testator in his will are competent evidence after his death, tending to prove his marriage and the legitimacy of his children, in a case where the persons so declared his wife and children are the devisees: *Pearson v. Pearson*, 46 Cal. 609.

Such declarations being competent evidence, and admitted without objection, in the absence of contradictory evidence prove such marriage and legitimacy, and are not to be disregarded because the wife and witnesses of the marriage are living, who might have been called: *Pearson v. Pearson*, 46 Cal. 609.

### **Dying Declarations.**

Dying declarations are only admissible when made under sense of impending death: *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *People v. Taylor*, 59 Cal. 640; *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30.

If there is the slightest hope of recovery, and it is plainly manifest that the declarations are made under a belief of impending death, they are inadmissible: *People v. Fuhrig*, 127 Cal. 412, 59 Pac. 693; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *People v. Taylor*, 59 Cal. 640; *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30; *People v. Gress*, 107 Cal. 461, 40 Pac. 752.

Dying declarations are admissible only where the death of the deceased is the subject of the trial, and the circumstances of the death are the subject of the declaration: *People v. Hall*, 94 Cal. 595, 30 Pac. 7. It is proper subject matter for a dying statement to declare that after the fatal shot defendant followed the deceased up a hill, and the deceased begged him not to shoot him any more, and that he was dying then: *People v. Yokum*, 118 Cal. 437, 50 Pac. 686.

Statements of the deceased which are mere matters of opinion as to the character of the particular injuries of which he was dying are not admissible as dying declarations: *People v. Lanagan*, 81 Cal. 142, 22 Pac. 482.

Dying declaration, in contemplation of law, refers only to the facts and circumstances surrounding the homicide, and constituting the *res gestae*; and a statement embodied with the dying declarations of the deceased as to a remark made by a codefendant in presence of the defendant at the time when they were brought before him some hours after the shooting, is hearsay, and inadmissible; and is not rendered admissible by the fact of the presence of the defendant when the remark was stated by the deceased; it being no part of the dying declaration, and not evidence under oath: *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833.

Where, however, the dying declarations of the deceased were admitted in evidence in rebuttal, without any objection interposed thereto by the defendant, error cannot properly be claimed by the defendant upon appeal for failure of the prosecution to offer such evidence in their case in chief: *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833.

Upon a trial for murder, declarations of the deceased not made in extremis, as dying declarations have reference to the circumstances of the death, and not constituting any part of the *res gestae*, are hearsay and admissible in evidence: *People v. Gress*, 107 Cal. 461, 40 Pac. 752.

Such declarations must relate to the circumstances of the death, and cannot be received as proof not connected as part of the *res gestae* with the death: *People v. Taylor*, 59 Cal. 640.

Dying declarations are restricted to the act of killing, and to the circumstances immediately attending it and forming a part of the *res gestae*. Such portions of a dying declaration as relate to former and distinct transactions should be excluded from the consideration of the jury: *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233.

Declarations made by one of two alleged conspirators while under a sense of impending death, that the defendant committed the burglary charged, are not admissible as "dying declarations." The rule in question makes such statements admissible only when made in relation to the cause of the death of the declarant: *People v. Hall*, 94 Cal. 595, 599.

### **Declarations of Agent are Admissible Against His Principal.**

Before the declarations of an agent are admissible to bind his principal the fact of the agency must be established. Evidence of the declarations of the person claimed to be such agent are inadmissible to establish the agency: *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 432, 40 Pac. 540.

A corporation is the agent of its stockholders and any admissions or declarations made by the corporation within the scope of its agency, and as part of the *res gestae*, may be proved against the stockholders as principals: *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

An agent has authority to make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made: Civ. Code, sec. 2319.

The declarations of an agent within the scope of the agency are admissible as against his principal: *Stockton etc. Works v. Glenn Falls Ins. Co.*, 121 Cal. 167, 63 Pac. 565; *Dingley v. MacDonald*, 124 Cal. 90, 56 Pac. 790; *Wilkins v. Stidger*, 22 Cal. 239, 83 Am. Dec. 64; *McGowan v. MacDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; *Crawford v. Transatlantic Fire Ins. Co.*, 125 Cal. 609, 58 Pac. 177.

But before declarations of an agent are admissible to bind his principal the fact of the agency must be established: *Smith v. Insurance Co.*, 107 Cal. 432, 40 Pac. 540.

Evidence of the declarations of the alleged agent are inadmissible to establish his agency: *Smith v. In-*

insurance Co., 107 Cal. 432, 40 Pac. 540; *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937; *Bergtholdt v. Porter Bros.*, 114 Cal. 681, 46 Pac. 738.

But they are admissible to show that the parties dealt with the alleged agent as an agent and not as a party: *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937; *Bergtholdt v. Porter Bros.*, 114 Cal. 681, 46 Pac. 738.

And the testimony of the agent is admissible to prove his agency directly: *Lake Shore Cattle Co. v. Modoc Land etc. Co.*, 130 Cal. 669, 63 Pac. 72.

The declarations of the agent to bind the principal must be within the scope of the agency: *McGowan v. MacDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

Declarations of an agent are only admissible when forming a part of the *res gestae*: *Matteer v. Brown*, 1 Cal. 221; *Garfield v. Knight's Ferry Water Co.*, 14 Cal. 35; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088.

And during the existence of the agency: *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088; *Crawford v. Transatlantic Fire Ins. Co.*, 125 Cal. 609, 58 Pac. 177.

#### **Declaration of Agent May be Proven and Proof of Agency Supplied Afterward.**

The action of the court in admitting evidence of what a husband did and said while ostensibly transacting certain business for his wife, before proof of his authority to transact such business, upon the express condition that it should not be considered unless the authority of the husband should thereafter be proved, is not prejudicial error, where the husband's authority is afterward satisfactorily proved: *Bates v. Tower*, 103 Cal. 404, 37 Pac. 385.

Notwithstanding the provisions of section 1870 of the Code of Civil Procedure, which permits the acts and declarations of agents to be proved "after proof of agency," yet the admission of the declaration of an agent before proof of the agency, upon condition that the proof of agency is afterward to be supplied, is not injury which is ground of reversal, if the proof of agency is thereafter supplied: *Bates v. Tower*, 103 Cal. 404, 37 Pac. 385.

**Declarations of Partners.**

Declarations of a partner are inadmissible against a copartner until after copartnership has been established: *Etchemende v. Stearns*, 44 Cal. 582; *Hudson Simon*, 6 Cal. 453; *Vanderhurst v. DeWitt*, 95 Cal. 57, 80 Pac. 94.

An admission of one partner that the partnership exists is not proof of that fact as against the other: *Etchemende v. Stearns*, 44 Cal. 582.

An admission made by partner after dissolution of the partnership is not competent to charge the other party: *Burns v. Mackenzie*, 23 Cal. 101.

The partnership having been established, the books of the firm and the entries therein are admissible in evidence against one charged as partner: *Bryce v. Joynt*, 63 Cal. 375, 49 Am. Rep. 94.

**Miscellaneous Agencies.**

Declarations of a corporation within the scope of its authority are binding on the stockholders: *McGowan v. MacDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

But declarations of the members are not binding on the corporations, unless acting by express authority: *Shay v. Tuolumne County etc. Co.*, 6 Cal. 73.

The president of a corporation may bind the corporation by his declarations: *Green v. Ophir Co.*, 45 Cal. 522; *Dana v. Christy*, 42 Cal. 175.

Admissions of an attorney during the trial of an action bind the party in that action: *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

But not in another action: *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

And an attorney merely authorized to prepare a petition appropriate to the procurement of letters of administration has no authority to describe the property of the estate so as to make it binding upon his client as an admission: *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

Conversations between an insurance solicitor and the insured not affecting the insurance are inadmis-



sible in an action on the policy: *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422.

And where an application for an insurance policy has been fraudulently obtained by the agent, the insurance company can derive no advantage from a stipulation therein that the company should not be affected by unwritten statements or promises made by the agent, of which stipulation the applicant had no knowledge, and which was fraudulently procured: *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053.

Evidence as to the declarations of one defendant are not admissible against a codefendant, where they are not joint defendants in a sense which would make the declarations of one binding upon the other: *Dean v. Ross*, 105 Cal. 227, 38 Pac. 912.

#### **Declarations of Conspirators.**

The act or declaration of a conspirator is evidence against his co-conspirator after proof of the conspiracy: *People v. Cotta*, 49 Cal. 166; *People v. Geiger*, 49 Ga. 643; *People v. Brown*, 59 Cal. 345; *People v. Estrado*, 49 Cal. 171; *Lacy v. Porter*, 103 Cal. 597, 37 Pac. 635; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678; *People v. Trim*, 39 Cal. 75; *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597.

Declarations of a co-conspirator who has not been prosecuted are equally admissible with those of one under indictment and prosecution: *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

And where the conspirators are tried separately, the declarations of the one not on trial may be received: *People v. Geiger*, 49 Cal. 643.

But declarations of a co-conspirator must be made during the life of the conspiracy, acts and declarations after the commission of the alleged offense are inadmissible: *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People v. English*, 52 Cal. 212; *People v. Aleck*, 61 Cal. 137; *People v. Uwahah*, 61 Cal. 142; *People v. Collins*, 64 Cal. 293, 30 Pac. 847.

In civil actions, it is not necessary that the declarations be made in the hearing of the party charged: *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635.

Or that the party making the declaration was a party to the action: *Mamlock v. White*, 20 Cal. 598. But declarations of conspirators must be made as part of the *res gestae*: *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

“A criminal conspiracy being established, proof of the acts, admissions and declarations of any one of the conspirators in pursuance and furtherance of the criminal enterprise, and in reference to it, is competent evidence against all”: *People v. Brown*, 59 Cal. 345, 352.

Declarations made by the murdered person on several occasions prior to his death, that he feared the defendant and another would murder him, are not admissible, even to prove a conspiracy, under any known rule of evidence: *People v. Irwin*, 77 Cal. 494, 502.

#### **Conspiracy Must be Proven Either First or Last.**

The declarations of the relatives of the alleged wife are not admissible as those of co-conspirators with her to impose upon the estate of the deceased, where there is not sufficient evidence of a conspiracy between them to justify the admission of the evidence on that ground: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

But declarations of an alleged co-conspirator are inadmissible in the absence of the evidence of the conspiracy: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

But order of proof is immaterial: *People v. Compton*, 123 Cal. 403, 56 Pac. 44.

While it is within the proper discretion of the trial court to permit the prosecution to give evidence of the declarations of a conspirator prior to the evidence of a conspiracy, and, on the promise of the prosecution to properly connect the two later on, still it is a practice too often resorted to: *People v. Compton*, 123 Cal. 403, 408.

**Res Gestae Declarations may be Contradicted.**

There is nothing conclusive about a res gestae declaration. While it is admissible, still, it does not preclude contradiction: *In re Bauer*, 79 Cal. 304, 311.

**Evidence on Former Trial.**

On a new trial of an action for the partition of lands ordered by this court on appeal, the parties are entitled to use the documentary evidence, maps, exhibits, etc., used at the former trial, and remaining on file in the court below, including the report of the testimony as taken by the referees before whom such trial was had, subject, however, to objection as when first offered: *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

Testimony of reporter, based upon his notes, is competent to prove the testimony of a witness given in a foreign language at a former trial, and taken down by the reporter from the interpreter. The interpreter, or some other person who heard and understood the language in which the testimony was given, should have been called: *People v. Ah Yute*, 56 Cal. 119.

Notes of testimony of witnesses taken down by shorthand reporter in the presence of the court, at the time of the granting of the continuance, but not read over to the witnesses, or corrected or signed by them, nor certified by the reporter or by any other person, are lacking in the essential elements of a deposition, and the uncertified transcript of such notes is not admissible upon the trial: *Thomas v. Black*, 84 Cal. 221, 23 Pac. 1037.

Where a witness is shown to be out of the jurisdiction of the court, the testimony of the witness taken on a former trial is admissible: *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147.

**Testimony on Preliminary Examination—When Admissible.**

Where it is admitted, upon the trial of a defendant charged with the commission of a crime, that one of the witnesses is dead, it is proper to read in evidence his testimony taken before the committing

magistrate, which has been taken down in shorthand, transcribed, certified and filed, as required by section 869 of the Penal Code; and an objection thereto upon the ground "that due diligence has not been shown to bring this witness before the court to obtain his evidence in the regular way" is properly overruled: *People v. Douglass*, 100 Cal. 1, 34 Pac. 490.

In a criminal case, the testimony of a witness taken at a former trial, who is absent from the state at the time of a second trial, is admissible, and, being absolutely incompetent, is subject to the general objection that the evidence was incompetent, irrelevant, and immaterial: *People v. Gordon*, 99 Cal. 227, 33 Pac. 901.

#### **Testimony on Preliminary Examinations was Formerly Inadmissible.**

Evidence of committing magistrate as to the statement made by the prisoner on his preliminary examination is not admissible on the trial: *People v. Gibbons*, 43 Cal. 577.

The testimony of a witness taken down by the justice of the peace upon the preliminary examination of the defendant in the indictment is inadmissible on the trial of the indictment, except in the cases specified in section 686 of the Penal Code: *People v. Bojorquez*, 55 Cal. 463.

#### **Testimony of Absent or Deceased Witness.**

In a criminal case, proof may be introduced of what witness testified to on a former trial, if the witness has left the state: *People v. Devine*, 46 Cal. 46.

The reporter's transcript of the testimony of witnesses, given on a former trial of the case, was admitted in evidence after proof that the witnesses were out of the jurisdiction: Held, there was no error: *Chidester v. Consolidated Co.*, 59 Cal. 197.

If witness is within this state, so that process may compel him to testify, although out of the county where the case is tried, he is not "out of the jurisdiction," within the meaning of subdivision 8, of section 1870, of the Code of Civil Procedure, so as to

permit his testimony, given on a former trial, to be received in evidence: *Meyer v. Roth*, 51 Cal. 582.

Witness more than thirty miles from place of trial, and outside of the county, but within the state, is not out of the jurisdiction of the court, so as to authorize the reading of his testimony given at a former trial of the cause: *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 598.

Defendant objected to the introduction in evidence of the official reporter's transcript of the testimony of a witness at a former trial, because the testimony itself was not signed by the witness. It was shown that the witness was out of the state, and no objection being made to this mode of proving his testimony, held, that it was not error to admit it: *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942.

On a second trial for an alleged crime, the prosecution may prove what a witness, who has died since the former trial, testified to on that trial: *People v. Brotherton*, 47 Cal. 388; *People v. Murphy*, 45 Cal. 137.

In order to entitle the testimony of a witness, since deceased, to be received in evidence, it must be shown that the testimony was given in a case in which the parties to the suit in which it is offered, or their privies were parties: *Poorman v. Miller*, 44 Cal. 269.

The testimony of a witness in a prior action is not admissible, after his decease, in a subsequent action between different parties, and involving a controversy as to a different matter: *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61.

The testimony of a witness, since deceased, given on a former trial in a criminal case, may be proved on a subsequent trial by permitting a person who kept notes of such testimony, and who swears they contain the substance of the testimony, to read his notes to the jury: *People v. Murphy*, 45 Cal. 137.

Although a witness is outside of the county, and beyond the reach of a subpoena, still he is not "out of the jurisdiction" so as to make his testimony at a former trial admissible. As at common law, "out

of the jurisdiction'' means ''out of the state'': *Meyer v. Roth*, 51 Cal. 582, 583.

Although a person is outside of the reach of a subpoena, if her deposition may be compelled, her testimony at a former trial is not admissible: *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 598, 599.

If all the strict statutory requirements for the admission of a written copy of the testimony of a witness, given at a former trial are met, it is not necessary that the copy should be signed by the witness: *Hicks v. Lowell*, 64 Cal. 14, 22.

To admit the testimony of a witness given at a former trial, so far as the parties are concerned, it is necessary only that they have been the same, or have therein been represented: *Fredericks v. Judah*, 73 Cal. 604, 608.

Testimony of a witness given at a former trial between the same parties, or their successors in interest, is admissible, all other requirements having been complied with: *Briggs v. Briggs*, 80 Cal. 253, 254.

To admit the testimony of a witness given at a former trial between the same parties, it is very essential that the two actions should relate to substantially the same matter: *Marshall v. Hancock*, 80 Cal. 82, 85.

The rule that the testimony of a witness given at a former trial is admissible under certain circumstances does not apply to the testimony against a defendant in a criminal case, for section 686 of the Penal Code gives the defendant the privilege of demanding a confrontation: *People v. Gardner*, 98 Cal. 127, 131.

Section 686 of the Penal Code in no way, however, limits section 1070, subdivision 8, of the Code of Civil Procedure, in so far as the defendant's witnesses in a criminal case are involved. The privilege of a confrontation is one to be exercised only by the defendant: *People v. Bird*, 132 Cal. 261, 263.

An action of unlawful detainer, brought by the executrix of a deceased person to recover the possession of certain premises from his alleged lessee, and a sub-

sequent action by the latter against the heirs at law of the deceased, to quiet a title claimed to have been acquired by adverse possession to the same premises, are actions between the same parties, within the meaning of subdivision 8, of section 1870, of the Code of Civil Procedure; and testimony given on the prior action by a witness who has since died, as to whether the alleged lessee held possession of the premises as a tenant, or for himself, claiming the property as his own, is admissible in the subsequent action: *Fredericks v. Judah*, 73 Cal. 604, 15 Pac. 305.

It must be shown that the witness, whose deposition is admitted in evidence, was absent from the state: *People v. Riley*, 75 Cal. 98, 16 Pac. 544.

A defendant in a criminal prosecution has a right to be confronted with the witnesses against him in the presence of the court, with the single exception that the deposition of a witness properly taken at a preliminary examination may be read upon its being satisfactorily shown to the court at the time of trial that he is dead, or insane, or cannot, after due diligence, be found within the state; and it is error to admit in evidence the testimony of a stenographer as to the evidence given by a witness upon the preliminary examination; after the rejection of the deposition of such witness by reason of a defective certificate, although it was proved that such witness could not be found in the state, due diligence being used: *People v. Gardner*, 98 Cal. 127, 32 Pac. 880.

In a criminal case, the testimony of a witness taken at a former trial, who is absent from the state at the time of a second trial, is admissible, and, being absolutely incompetent, is subject to the general objection that the evidence was incompetent, irrelevant, and immaterial: *People v. Gordon*, 99 Cal. 227, 33 Pac. 901.

On the trial of an indictment, the reporter's notes of the testimony given on the trial of a former indictment for the same offense, by a witness, shown to be out of the state, are inadmissible in evidence: *People v. Chung Ah Chue*, 57 Cal. 567.

On the trial, the prosecution, after proving the death of one L., offered in evidence the reporter's

notes of his evidence given on a former trial of the case, and same were admitted. Held, this was error: *People v. Qurise*, 59 Cal. 343.

If a witness is within this state, so that process may compel him to testify, although out of the county where the case is tried, he is not "out of the jurisdiction," within the meaning of the above subdivision: *Meyer v. Roth*, 51 Cal. 582.

Nor is he "out of the jurisdiction" if within this state, for the purposes of this section while his personal attendance may not be enforced (section 1989), yet his deposition may be taken: *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 598.

#### **Qualification to Testify as Expert in General.**

The qualification of a witness to speak as an expert, if questioned, must first be determined: *Neal v. Neal*, 58 Cal. 287.

Whether one offered as an expert is qualified to speak as such is a fact preliminary to his testifying to be determined by the court at the trial, and it is error to refer it to the jury: *Fairbank v. Hughson*, 58 Cal. 314.

Witness called upon to give opinion as to value of land must lay proper foundation by showing that he possesses the means to form an intelligent opinion; but it is not essential that his knowledge should be derived from any particular skill in a particular pursuit or branch of business, or department of science: *Reed v. Drais*, 67 Cal. 491, 8 Pac. 20.

Subdivision 9 "is but a legislative enactment of a well-settled rule of evidence at common law": *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83.

Where a witness for the prosecution has testified that his experience for many years has qualified him to give an opinion upon a proper subject matter of expert evidence, it is not error for the court to admit his evidence, if there be no cross-examination; and if the defendant desires to test the knowledge of the witness and the correctness of his statement as to his ability to give an opinion, he must cross-examine him before he is called to express an opinion: *People v. Hawes*, 98 Cal. 648, 33 Pac. 791.



Qualification of an expert to answer hypothetical questions is largely a matter of discretion of the trial judge: *Howland v. Oakland Con. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983.

Usually the decision of the trial court as to the qualification of an expert will not be disturbed, but a clear case of abusive discretion will be reversed. So a miner who has used excelsior powder for twenty-two years is qualified to testify as to its safety, although he may not be able to chemically analyze it: *Sowden v. Idaho Quartz M. Co.*, 55 Cal. 443, 451.

In an action for the negligent construction and maintainance of a wooden dam and reservoir of defendant, by the breaking of which plaintiff's land was flooded, a question as to the experience and observation of a witness as to the breaking of earth dams is irrelevant; nor would proof of any amount of familiarity with earth dams qualify a witness to testify as an expert in regard to wooden dams: *Wiedekind v. Tuolumne County Water Co.*, 83 Cal. 198, 23 Pac. 311.

### **Conclusiveness of Expert Evidence.**

When an expert is called by one of the parties to an action, his evidence should be received with great caution by the jury, and should never be allowed except upon subjects which require unusual scientific attainments or peculiar skill: *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396.

Where the court has instructed the jury to the effect that the opinion of experts as to the value of the medical services rendered is not conclusive, but that the purpose of their introduction is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby aid them in the exercise of their own judgment upon the facts, which must be exercised independently of the opinion evidence, it is not error to refuse to add an express admonition that such evidence should be received with scrutiny and caution: *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596.

**Testing Value of Opinion.**

The value of the opinion of a witness may be tested by showing that on a former occasion he has expressed a different opinion, and by inquiring as to the grounds upon which the change of his opinion had been brought about: *People v. Donovan*, 43 Cal. 162.

A witness may be permitted to state the grounds of an opinion to which he has testified; and such statement is not objectionable as being necessarily argumentative: *People v. Bird*, 124 Cal. 32, 56 Pac. 639.

The mere abstract opinion of any witness, medical or of any other profession, is not of any importance; but the opinions of witnesses must be brought to the test of facts, that the court or jury may judge what weight the opinion is entitled to; and no court is justified in deciding against the mental capacity of a testator upon the mere opinion of witnesses, however numerous or respectable: *Estate of Redfield*, 116 Cal. 637, 48 Pac. 794.

The expert evidence of medical witnesses, based only upon the inadmissible declarations of the deceased as to his physical condition and symptoms, have no basis, and are wholly inadmissible: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

The proper and safe course for the examination of witnesses who testify as to the value of the land sought to be condemned is to state their opinion as to the market value of the property, having regard to the existing business wants of the community, or such as may be reasonably expected in the near future, and support their estimates by a description of the property, giving its location, surroundings, and advantages for any particular use, if it have any. The value of the opinion given may be tested by cross-examination of the widest latitude: *San Diego L. & T. Co. v. Neale*, 88 Cal. 50, 25 Pac. 977.

**Hypothetical Questions.**

A hypothetical question to a medical expert, based upon a supposition in respect to which there is no evidence, and no offer to produce evidence, may be

properly disallowed by the court: *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130.

All the testimony given in case cannot properly be read as part of the hypothetical question to a medical witness. Counsel should assume certain facts, and put the usual hypothetical question: *People v. Golden-son*, 76 Cal. 328, 19 Pac. 161.

Where an expert witness has heard a statement of facts testified to by another witness, it is sufficient, in putting to him a hypothetical question, to direct his attention to the testimony heard as the basis upon which his opinion is desired, without repeating the testimony: *Howland v. Oakland Con. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983.

#### **What Are not Proper Subjects of Expert Evidence.**

It is not proper to admit the testimony of expert witnesses as to what appliances were safe and what were unsafe. The jury is the proper judge of the safety of the appliances actually used: *Hanley v. California Bridge etc. Co.*, 127 Cal. 232, 59 Pac. 577.

Expert testimony as to the habits and instincts of domestic animals, and the kind of fence necessary to restrain them, will not be received; the experience of the jury renders it unnecessary: *Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 236.

So expert testimony cannot be given to show whether a bullet wound could be inflicted by a shot fired from a certain direction: *People v. Westlake*, 62 Cal. 303.

Where the facts from which negligence is sought to be inferred are within the experience of all men of common education, the jury must determine the question of negligence without the aid of experts: *Shafter v. Evans*, 53 Cal. 32.

A question as to whether the mixing of his own cattle, by the deceased, with those of the defendant upon government land, occupied by defendant, was not apt to give rise to trouble or dispute, is objectionable, as calling for an opinion or inference, which the jury alone were competent to form upon or infer from.

the facts in evidence: *People v. Clark*, 84 Cal. 573, 24 Pac. 313.

In an action against the city for damages caused by back-water, the question whether the plaster in plaintiff's building, which had been caused to settle six or seven inches, would be in the same condition after as before the building settled is not a proper subject for expert evidence: *Richardson v. Eureka*, 96 Cal. 443, 31 Pac. 458.

**Expert Evidence not Necessary to Enable the Court to Fix Value of Attorneys' Fees.**

No evidence of the extent or value of the services of the attorneys of the mortgagor is necessary as a basis of the allowance fixed by the court. The observation of the court is sufficient evidence of the services, and it has discretion to fix the fee without calling for the opinion of witnesses to assist it: *Hotaling v. Monteith*, 128 Cal. 556, 61 Pac. 95.

The court may fix the amount of the attorneys' fees without receiving any evidence upon the subject: *Security Loan etc. Co. v. Mattern*, 131 Cal. 326, 63 Pac. 482.

In determining value of services rendered by attorney in the settlement of an estate, the opinions of professional witnesses are not binding on the court: *Estate of Dorland*, 63 Cal. 281.

**Physicians as Experts.**

A physician cannot testify as an expert to the relative powers of eyesight of two different persons, under certain named conditions, unless it is first shown that he has made an examination of their eyes: *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503.

A physician cannot testify that in rendering the services sued for he made discoveries as to new and improved methods of treatment. Such discovery cannot bear upon the question of the defendant's liability, nor can he be asked for his opinion as to discoveries made, as distinguished from what he actually did: *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880.

It is not competent, upon the examination of medical witnesses, either on direct or cross-examination.

to read to them extracts from medical works, and ask them whether what is so read corresponds with their own judgment, when it is apparent that the sole object of so doing is to place before the jury the opinion of the author of the books referred to: *Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091.

The reading of extracts from medical works, and asking an expert medical witness if he agrees with the author, is not permissible on cross-examination, where the extracts do not contradict the evidence of the witness, and are evidently intended as evidence for the cross-examining party to sustain his theory of the case. Questions as to extracts from such works, on cross-examination, should be strictly limited to the one purpose of testing the competency of the witness as an expert, or the value of his opinions: *Fisher v. Southern Pac. R. R. Co.*, 89 Cal. 399, 26 Pac. 894.

Though medical books cannot be read, a medical witness may refer to cases on record "as grounds of his opinion": *Healy v. Visalia etc. R. R. Co.*, 101 Cal. 585, 36 Pac. 125.

A plaintiff, though not an expert, may testify as to the immediate physical consequences of an injury received by him: *Bland v. Southern Pac. R. R. Co.*, 65 Cal. 626, 4 Pac. 672.

Upon the contest of a probate of a will, where the mental condition of the deceased was at issue, the testimony of qualified medical experts under hypothetical questions, properly framed, upon the subject of his unsoundness of mind, was competent evidence, and it was the sole province of the jury to determine the credibility of the experts, and the weight to be given to their testimony; and an instruction by the court discrediting the testimony of medical witnesses given upon hypothetical questions, as experts, as unsatisfactory and unreliable, and giving the reasons why, in the judge's opinion, it was such, invaded the province of the jury, and improperly charged them as to matters of fact: *Estate of Blake*, 136 Cal. 306, 307.

**Experts—Miscellaneous Subjects of Expert Testimony.**

A witness who shows sufficient knowledge about brands and cattle-marks to testify upon the subject may be examined as an expert, although not familiar with particular brands used in certain counties: *People v. Fitzpatrick*, 80 Cal. 538, 22 Pac. 215.

The opinion of experts is not admissible on the question of the sufficiency of a fence to turn cattle: *Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 230.

The testimony of witnesses who have had personal observation of the sufficiency of a fence to keep out stock, is admissible to prove that it so operated. Such testimony is not matter of opinion: *Silvarer v. Hansen*, 77 Cal. 579, 19 Pac. 233.

A banking game is a game conducted by one or more persons, where there is a fund against which everybody has a right to bet, the owner of the bank being responsible for the payment of all funds, taking all that is won, and paying out all that is lost. The definition of such game is a question of law, and expert evidence should not be allowed to determine the definition: *People v. Carroll*, 80 Cal. 153, 22 Pac. 129.

Upon question as to whether place of killing was within five hundred yards of boundary line of the county of the indictment, the estimate of a witness who had been upon the ground, but who had not actually measured the distance, was admissible: *People v. Alviso*, 55 Cal. 230.

In an action to abate a nuisance caused by the erection of a dam, and the consequent overflow of land by back-water, the evidence of an expert as to the effect of an obstruction in causing the back-water is admissible: *Grigshy v. Clear Lake Water Co.*, 40 Cal. 396.

A witness who has had many years' practical experience in mining any measuring and selling water to miners, although not an expert in the science of measuring water, may testify to the carrying capacity of a particular water ditch: *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838.

In an action to recover for services rendered as manager of a certain business, for which services the plaintiff was to receive one-half the profits of the business, evidence given by an expert accountant employed by the defendant to examine the books, as to the net profits of the business, is admissible for the plaintiff, where no objection is made to the testimony by the defendant, even though it appears that the expert made no personal examination of the books except of a few items, but that his partner made a detailed examination, and furnished the figures from which the expert made the calculations, the figures having been presented to both parties, and assented to, the defendant objecting only to the calculation as to the amount of profits: *Schurtz v. Kerkow*, 85 Cal. 277, 24 Pac. 609.

On a trial for forgery committed by altering a check, by extracting writing therefrom and writing new words or figures in place thereof, a witness, who is not called as a scientific expert, may testify as to the chemical effect a powder found in the possession of the defendants had on writing in a check similar to that by the alteration of which the forgery was committed, and the check upon which the effect testified to by the witness was produced may be exhibited to the jury: *People v. Brotherton*, 47 Cal. 388.

The owner of land whose property is sought to be taken for a public use, who has resided upon it and owned it for over twenty years, will be presumed to have acquired sufficient acquaintance with it and of the value of land in that neighborhood to be able to give an intelligent estimate of its value: *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681.

In an action to determine the right to purchase school land from the state as timber land, it is not error to permit a witness to be asked what it would cost, in his judgment, to clear off the land in question, where it appears that the witness had an ordinary knowledge, as a farmer and logger, of land and its qualities. It is for the trial court to determine the weight to be given to such evidence: *Barnum v. Bridges*, 81 Cal. 604, 22 Pac. 924.

Whether the straight pen which fastened the single tree to the drawhead of a horse-car was safe, or whether, if it should come out, it would be unsafe, are questions for the jury to determine; and the opinion evidence of a street-car driver, that from his experience it was not safe, and that, in case it should come out, the chances are that the horse would get away, is incompetent: *Sappenfield v. Main Street etc. E. R. Co.*, 91 Cal. 48, 59.

A qualified expert may testify as to the relative strength of wrought and cast iron as material for the part of the machine in question, the evidence being pertinent and material to the issue: *McFaul v. Madera Flume & Trading Co.*, 134 Cal. 313, 314.

The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is a proper subject for expert evidence, and not a matter of such common knowledge that the jury can judge as intelligently as one skilled in their use: *Howland v. Oakland Con. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983.

A person not a lawyer is incompetent to put, as an expert, a value on legal services: *Hart v. Vidal*, 6 Cal. 57.

Where a contract relates to the mechanic or scientific arts, it is common and prudent to admit the opinion of experts to explain it, and where the evidence otherwise tends to limit or enlarge the apparent meaning of the words used, the opinions of witnesses who are in the habit of making and executing such contracts are almost indispensable: *Reynolds v. Jourdan*, 6 Cal. 112.

A stockraiser is a competent witness to estimate the damage done to cattle by falling through a wharf: *Polk v. Coffin*, 9 Cal. 56.

Where in an action to recover damages occasioned to the plaintiff from his detention by the defendants, carriers, a witness was permitted to give his estimate of the value of plaintiff's services per day which he placed as high as one hundred dollars, and stated, as ground for his opinion, that plaintiff was a speculator,



possessed of large property, money invested in stocks, rents and other sources of income, and frequently made from one hundred to five hundred dollars per day, it was held inadmissible: *Hastings v. "Uncle Sam,"* 10 Cal. 341.

When the value of work is in issue, it is competent to ask a witness skilled in the business, and who has made an estimate, "How much time would it take to do the work?": *Swain v. Naglee*, 17 Cal. 416.

A person who has been engaged in measuring and selling water to miners for four or five years is sufficiently an expert to give his opinion as a witness upon the effect which a dam across a stream will have in raising the water in the channel above: *Blood v. Light*, 31 Cal. 115.

A practical miner, who has used blasting powder for years, and used a large amount of a certain powder, can be asked his opinion, based upon experience, as to the safety of that powder: *Sowden v. Idaho etc. M. Co.*, 55 Cal. 443.

#### **Opinion of Intimate Acquaintances as to Sanity.**

Where a witness who testifies to an acquaintance with the testator was asked for his opinion as to his sanity, the determination of the question as to whether the acquaintance was of an intimate character sufficient to justify the opinion of the witness under section 1870 of the Code of Civil Procedure is within the discretion of the court, and a ruling permitting the opinion to be given will not be reviewed, unless a clear abuse of discretion is apparent: *Estate of Wax*, 106 Cal. 343, 39 Pac. 624.

So a Roman Catholic priest may be permitted to testify as an expert as to his opinion of the mental condition of a testatrix during his visits to her, it being part of his collegiate education, and a matter of daily practice with him for a period of ten years, to familiarize himself with the mental condition of persons upon whom he attended in his character as priest: *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83.

Court has discretion in admitting testimony of "intimate acquaintances" as to insanity: *People v.*

Barthleman, 120 Cal. 7, 52 Pac. 112; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People v. Schmitt*, 106 Cal. 52, 39 Pac. 204; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *Estate of Carpenter*, 94 Cal. 414, 29 Pac. 1101; *In re Wax*, 106 Cal. 343, 350, 39 Pac. 624.

Statements of persons who are neither intimate acquaintances nor experts as to the peculiar conduct and conversation of the person charged with insanity, are competent evidence: *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

To be qualified as an expert to testify as to the mental condition of a person, one need not be a physician. It is sufficient if he is shown to be in any way qualified to pass an intelligent judgment in view of his past experience: *Estate of Toomes*, 54 Cal. 509, 512.

The determination of the question as to whether the acquaintance with the defendant of persons who testified as to his sanity was intimate, as required by subdivision 10, section 1870, of the Code of Civil Procedure, is within the discretion of the court below, and the appellate court will not interfere if it does not appear that such discretion was abused: *People v. Fine*, 77 Cal. 147, 149; *In re Carpenter*, 79 Cal. 382, 384; *Estate of Carpenter*, 94 Cal. 406, 414; *Wheelock v. Godfrey*, 100 Cal. 578, 583; *In re Wax*, 106 Cal. 343, 351; *People v. McCarthy*, 115 Cal. 255, 257; *Estate of Keithley*, 134 Cal. 9, 12; *People v. Barthleman*, 120 Cal. 7, 14.

The sufficiency of the acquaintance of a witness with the defendant to enable him to testify as to his sanity is a question for the judge, and not for the witness; and the fact that the witness stated that he did not regard himself as intimately acquainted with the defendant does not make the admission of his evidence upon the question of sanity of the defendant erroneous where the facts developed upon his examination justified the admission of the evidence: *People v. McCarthy*, 115 Cal. 255, 260.

#### **Opinion of Witness as to State of Party's Mind.**

A witness, even though not an expert, who details the conversation between himself and another, may

also, in connection therewith, state his opinion, belief, or impression as to the state of mind of such person, as it seemed or appeared to the witness at the time of the conversation: *People v. Wreden*, 59 Cal. 392, 394; *Estate of Dalrymple*, 67 Cal. 444, 445; *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338, 345; *Holland v. Zollner*, 102 Cal. 333, 336.

In a prosecution for an assault with intent to commit murder, a witness who was present at the time of the alleged assault may testify as to whether the defendant appeared rational or irrational at that time, notwithstanding he has not first shown himself to be an intimate acquaintance of the defendant: *People v. Lavelle*, 71 Cal. 351, 352.

#### **Witness Cannot Testify as to Testamentary Capacity.**

The capacity of a testator to make a will involves a question of law, as well as of fact, and it is for the jury to determine under instructions from the court; and the opinion of a witness as to such capacity is not admissible in evidence, upon the hearing before a jury of a petition to annul the probate of the will on the ground of the alleged incompetency of the testator: *Estate of Taylor*, 92 Cal. 564, 565.

#### **Opinion of Subscribing Witness as to Sanity.**

The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer, may be given in evidence: *In re Wax*, 106 Cal. 343, 349.

#### **Common Reputation in Trials for Forgery.**

Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by general reputation; and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited: *Pen. Code*, 1107.

**Facts of General or Public Interest.**

The residence of the claimant of a homestead at the time the declaration was filed is not a fact of any general or public interest, and cannot be proved by evidence of the general understanding and report in the community: *Pfiester v. Dascey*, 68 Cal. 572, 573.

**Common Reputation in Matters of Boundary.**

Even in regard to boundaries of parishes and towns it is only received where such boundary is of remote antiquity: *Vanderslice v. Hanks*, 3 Cal. 45.

Where defendant offered to prove the southern boundary of Napa county by evidence of general reputation among persons living near the line in question, and in other parts of the county, it was held that he might prove, by general reputation, which of two or more streams in 1855 was known as Guichica creek, or where was the line of San Pablo bay, so as to ascertain the initial point as declared by the legislature; but general reputation was not admissible to show where a line commencing at the point thus ascertained and running east was or would be: *Lay v. Neville*, 25 Cal. 554.

In an action to recover damages for the taking of land by a railroad company, consisting of part of a city lot situated on the public street, evidence of common reputation or hearsay existing before the controversy arose as to the initial point of the survey of the street, to show the line of the street, is admissible. Common reputation or hearsay is admissible to establish a boundary line of general or public interest, provided it existed before the controversy arose: *Muller v. Railway Company*, 83 Cal. 240, 242.

**Common Reputation as to Paternity.**

Paternity cannot be proved by general reputation; and it was error to admit proof that, according to the general reputation in the community where she resided, the respondent was the daughter of the deceased person claimed as her father. It is only the common reputation in the family and not the common reputation of the community, that is ad-

missible on questions of pedigree: *Estate of Heaton*, 135 Cal. 385, 388; *Estate of Mills*, 137 Cal. 298, 303.

#### **Declarations of Deceased Persons as to Pedigree.**

“Before the declarations of a deceased person can be admitted, in case of the pedigree, the relation of the declarant to the family must be established by other testimony”: *Estate of Williams*, 128 Cal. 549, 554.

#### **Usages.**

If a contract contains an express warranty, such as “in good order,” etc., evidence of a custom, the effect of which would be to relieve the warrantor of liability on his warranty, should be rejected: *Polhemus v. Heiman*, 50 Cal. 441.

The custom of merchants is not admissible to vary the plain meaning of a written contract: *Corwin v. Clayton*, 4 Cal. 204; *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, 45 Pac. 7; *Holloway v. McNear*, 81 Cal. 154, 22 Pac. 514. Compare *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916.

In an action for services rendered in the capacity of secretary, against a corporation, it was held that defendant might show that by the usage and custom of the corporation no compensation was payable, and that plaintiff, as a member of the corporation, was *prima facie* fixed with notice of the custom: *Fraylor v. Sonora M. Co.*, 17 Cal. 595.

Parol evidence is admissible to show what was meant by “stubble”: *Callahan v. Stanley*, 57 Cal. 476.

In an action on a written contract for the sale of stock by a member of a board of brokers, to be delivered to the buyer in thirty days, to recover the amount of the first payment, if the contract acknowledges the receipt thereof, the plaintiff may notwithstanding give evidence of the custom of the board of brokers to account for the delivery of the contract without receiving the money: *Winans v. Hassey*, 48 Cal. 634.

Though evidence of usage is not admissible to relieve a party from his express stipulation or to vary

a contract certain in its terms, it has a legitimate office in aiding to interpret the intention of the parties to a contract, the character of which is to be ascertained from general implications and presumptions: *Burns v. Sennett & Miller*, 99 Cal. 363, 372.

### **Mining Usages.**

In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state, must govern the decision of the action: *Code Civ. Proc.*, 748.

If a custom exists among miners, in locating tunnel or hill claims, of establishing a front line from which they run back to a perpendicular plane dropped from the center line of the summit, such custom might explain the meaning of the phrase "running back into the hill": *Reamer v. Nesmith*, 34 Cal. 628.

### **Intention of Parties to Contract.**

The rights of the parties to a written contract must be ascertained from its terms; and whether the writing be lost or not, evidence of the intention of the parties in making it is inadmissible, in the absence of fraud or mistake: *Nicholson v. Tarpey*, 89 Cal. 617, 622; *Nicholson v. Tarpey*, 124 Cal. 442, 446.

## TITLE II.

### OF THE KINDS AND DEGREES OF EVIDENCE.

Chapter I. Knowledge of the court, § 1875.

II. Witnesses, §§ 1878-1884.

III. Writings, §§ 1887-1951.

IV. Material objects presented to the senses,  
other than writings, § 1954.

V. Indirect evidence, §§ 1957-1963.

VI. Indispensable evidence, §§ 1967-1974.

VII. Conclusive and unanswerable evidence,  
§ 1978.

## CHAPTER I.

### KNOWLEDGE OF THE COURT.

§ 1875. Judicial notice.

Judicial notice in general.

Courts take judicial knowledge of meaning  
of words.

Judicial notice of what is established by  
law.

Judicial notice of official acts.

Judicial notice—Contents of records.

Judicial notice of the measure of time.

Matter of common knowledge.

Miscellaneous subjects of judicial notice.

Matters not taken judicial notice of.

§ 1875. Judicial Notice.

Courts take judicial notice of the following  
facts:

1. The true signification of all English words and phrases, and of all legal expressions:

2. Whatever is established by law;

3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States;

4. The seals of all the courts of this state and of the United States;

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States;

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

*Cross-references:*

Judicial knowledge to be declared to the jury, who are bound to accept it, section 2102.

Subdivision 1. Usage is admissible as an instrument of interpretation, section 1870, subdivision 12;



where terms of writing have a local, technical, or peculiar signification, agreement must be construed accordingly, section 1861.

Subdivision 2. Expert evidence as to foreign laws, section 1902; books of report as evidence of foreign law, section 1902; laws defined, section 1895; written laws defined, section 1896; organic law defined, section 1897; unwritten law defined, section 1899; books admissible to show written law of sister state, section 1900.

Subdivision 3. Public writings classified, section 1894; official documents, how proven, section 1913; executive acts how proven, section 1918, subdivision 1; legislative proceedings, how proven, section 1918, subdivision 2; recitals in public statutes as evidence, section 1903; recitals in private statute as evidence, section 1903; written acts of records thereof of sovereign authority, official bodies and public officers are public writings, section 1888, subdivision 4.

Subdivision 4. Judicial record of sister state to be under seal, section 1905; copy of written law under public seal admissible as evidence, section 1901; subpoena to be under seal, section 1986, subdivision 1; affidavit taken in another state to be under seal, section 2013; commission to take deposition to be under seal, section 2024.

Subdivision 6. Historical works admissible to prove facts of general notoriety, section 1936.

Subdivision 7. Effect of judgment taken of foreign law court of admiralty, section 1914.

Subdivision 8. Historical works as evidence, section 1936; scientific books as evidence, section 1936.

See Jones on Evidence, subdivision 1, section 131.  
Meaning of words and phrases—The Scriptures, section 131.

Subdivision 2, sections 105-111, 112-133.  
Existence of governments—Domestic and foreign, section 105.  
Foreign flags and seals—State of war or peace, section 106.

- Territorial extent and subdivisions — Counties —  
Towns—Cities, etc., section 107.
- Officers of the national government, section 108.
- State and subordinate officers, section 109.
- Officers—Notaries public, section 110.
- Official signatures and seals, section 111.
- Law of the forum—International law—Foreign treaties, section 112.
- Acts of Congress — Constitutions — Statutes of the state, section 113.
- What are public statutes, section 114.
- Bank and railway charters, section 115.
- Municipal charters, section 116.
- Ordinances and other acts of municipal bodies, section 117.
- Character and existence of the statute, a question for the court, section 118.
- Private statutes—Statutes of sister states, section 119.
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- Federal courts—State statutes, section 121.
- The unwritten law, section 122.
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- Courts—Officers of the court—Records—Terms, section 124.
- Matters of history, section 125.
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- Meaning of words and phrases—The Scriptures, section 131.
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- Subdivision 3, sections 117, 118.
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Subdivision 5, sections 106, 108-111.

Foreign flags and seals—State of war or peace, section 106.

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Subdivision 7, sections 110, 111.

Officers—Notaries public, section 110.

Official signatures and seal, section 111.

Subdivision 8, sections 125, 130.

Invariable course of nature, section 130.

Matters of history, section 125.

#### **Judicial Notice—in General.**

The provision of section 765 of the municipal corporation act, to the effect that in cities of the fifth class it shall not be necessary in any action, civil or criminal, to plead or prove the existence or validity of any ordinance thereof, and that courts shall take judicial notice thereof without proof, is special legislation regulating the practice of courts of justice, and in a case where a general law can be made applicable in violation of section 25 of article 4 of the constitution: *City of Tulare v. Hevren*, 128 Cal. 226, 58 Pac. 530.

#### **Courts Take Judicial Knowledge of Meaning of Words.**

The courts will take judicial notice of the meaning of customary abbreviations of common words, including all conventional expressions or arbitrary signs that have passed into common use: *Estate of Lake-meyer*, 133 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961.

The court will take judicial notice of the significance of the word "kindergarten," and that the term applies to a system elaborated for the instruction of children of very tender years, guiding their inclination to play into organized movement and investing

games with an ethical and educational value: *Sinnott v. Colombet*, 107 Cal. 187, 40 Pac. 329.

Whether a publication is libelous per se is to be determined wholly by the sense in which the same is usually understood and received in this state; and, when words have a general and notorious signification in this state, courts will take judicial notice of it: *Clarke v. Fitch*, 41 Cal. 472.

The courts take judicial notice of the true meaning of all legal expressions, including all the terms used in the constitution or in acts of the legislature: *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393.

The court will take judicial knowledge of the fact that a "fence pole," is a heavy club: *Baker v. Hope*, 49 Cal. 598.

Court took judicial notice of various mining terms in *Hines v. Miller*, 122 Cal. 517, 55 Pac. 401.

A word or phrase may be of such ambiguous import that its meaning cannot be determined without reference to the circumstances surrounding the parties who used it at the date of the transaction, and in such case the court will look to such surrounding circumstances to ascertain the intention of the parties: *Grennan v. McGregor*, 78 Cal. 258, 20 Pac. 559.

The court takes judicial notice of the true signification of all English words and phrases, and may resort for aid to any appropriate books of reference. The expression "branch railroad" may be thus explained: *Grennan v. McGregor*, 78 Cal. 258, 262.

The courts take judicial notice of the true meaning of all legal expressions, including all the terms used in the constitution or in acts of the legislature, for instance "on margin" or "to be delivered at a future day": *Sheehy v. Shinn*, 103 Cal. 325, 329.

Courts will take judicial notice of the true significance of all English words and phrases, and that such expressions as "shafts, tunnels, chutes, stopes, up-risers, cross-cuts, inclines, etc.," when applied to mine, signify instrumentalities through which the mines are opened, developed, prospected and worked; and he who engages in a construction of any of them is en-

gaged in mining equally with one who extracts the gravel or ore from the mine: *Hines v. Miller*, 122 Cal. 517, 519.

**Judicial Notice of What is Established by Law.**

The courts take judicial notice of what towns are established by law as the county seats of the respective counties of the state: *Cole v. Segraves*, 88 Cal. 103, 25 Pac. 1109.

The courts will take judicial notice of "whatever is established by law," and hence that Los Angeles is the county seat of Los Angeles county, and in said county: *People v. Etting*, 99 Cal. 577, 34 Pac. 237.

Judicial notice will be taken of county boundaries and of the location of lands described by government subdivisions, as by township, range and section, and the legal subdivisions thereof: *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000.

In an action to foreclose a mortgage brought in a new county framed out of the county described in the mortgage, the court will take judicial notice that the premises are situated in the new county: *Faekler v. Wright*, 86 Cal. 210, 24 Pac. 996.

Judicial notice of fact of incorporation of city or town: *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

San Francisco having been constituted, by a public, political act of the former government, a pueblo, courts will take judicial notice of its existence, powers and rights, and among these last its general boundary and jurisdiction: *Payne v. Treadwell*, 16 Cal. 220.

The court will take judicial notice of the actual possession by a city of part of its public lands, and of its constructive possession of the remainder: *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

The courts will take judicial notice of the streets of San Francisco as designated on the official plan or map of the city: *Whiting v. Quackenbush*, 54 Cal. 306.

The courts will take judicial notice of streets established by act of the legislature, and of their relation

to each other, and of the directions in which they run: *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283.

The courts take judicial notice of the streets of San Francisco, and of their relation to each other, and of the direction in which they run: *Brady v. Page*, 59 Cal. 52, 55.

Courts will take judicial notice of the streets of San Francisco of their relation to each other and their location, and that a crossing where an improvement was located necessarily forms a part of the public street: *Williams v. Savings etc. Soc.*, 97 Cal. 122, 31 Pac. 908.

The courts will take judicial notice of the streets of San Francisco and of their relation to each other, and of the directions in which they run: *Brady v. Page*, 59 Cal. 52, 301.

An objection to a complaint brought to foreclose a mortgage, on the ground that it does not show that the mortgaged premises are in the county where the action was commenced and the decree rendered, is not well taken, where it appears from the description in the mortgage, which is annexed to and made a part of the complaint, that the mortgaged premises were part of a legal subdivision which the court knows judicially to have been within the boundaries of the county where the suit was brought at the time of the commencement of the action although at the date of the mortgage the county had not been subdivided: *Scott v. Sells*, 88 Cal. 26 Pac. 350.

The action was brought to foreclose a mortgage. The complaint alleged that the mortgage was duly recorded in the office of the recorder of San Diego county, and described the mortgages premises as lot G., in block numbered 93, in Horton's addition to San Diego as per maps on file in the county recorder's office, made by James Pascoe. Held, that the situation of the mortgaged property in San Diego county was sufficiently alleged, and judicial notice being taken that there is but one San Diego county in the state, that the superior court of that county had jurisdiction of the subject of the action: *Graham v. Stewart*, 68 Cal. 374, 9 Pac. 555.

The laws of Spain and Mexico which were in force in California prior to its conquest will be judicially noticed; and allegations in a complaint contrary thereto are not admitted by a demurrer to the complaint: *Ohm v. City and County of San Francisco*, 92 Cal. 437, 28 Pac. 580.

The courts will take judicial notice of census returns: *People v. Williams*, 64 Cal. 87, 27 Pac. 939.

The legal rate of interest in other states, or the fact that the judgments of other states bear any rate of interest, are matters of fact to be proven, and cannot be judicially noticed: *Cavender v. Guild*, 4 Cal. 250.

The court will take judicial notice of the filing of the state census returns with the Secretary of State at the date of their filing, and that the returns establish the enumeration as of the date of the commencement of the census; *People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270.

The court will take judicial knowledge whether any county in the state has a population which places it in a specified class, and what number of counties belong to a particular class: *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66.

The curative acts of 1870 and 1872 are essentially general acts, of which the court will take judicial notice, and it is not necessary either to allege their existence or prove them at a trial involving their application to a prior defective certificate of purchase: *People ex rel. Lynch v. Harrison*, 107 Cal. 541, 40 Pac. 956.

The court will take judicial notice that a road district alleged to be in Humboldt county is in the state of California: *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. 710.

Under the Van Ness Ordinance, the several ordinances of the common council, and the map prepared in pursuance thereof, known as the "Van Ness map," were confirmed and made the subject of judicial notice: *City and County of San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803.

The powers of the city are derived from its charter, and from public laws, of which the courts take judicial notice: *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762.

Whether or not a new county had been created and existed at the time of the trial of a criminal action is a matter of judicial notice, where the act for the organization of the county declares that it shall be and become an organized county from and after the day upon which the returns of an election in favor of creating it shall be ascertained and declared by the board of commissioners: *People v. Wallace*, 101 Cal. 281, 35 Pac. 862.

The county in which lands, described in a complaint by section, township and range of the United States government survey, are situated is a matter within the judicial knowledge of the court, and is to be determined by it in the same manner as a legal proposition, and cannot be made an issue between the parties to be determined by the court in each case upon conflicting evidence presented in that case: *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81.

The courts take judicial notice of the revenue laws: *Carpenter v. Shinnars*, 108 Cal. 359, 41 Pac. 473.

"It has never been held, however, that a court would, by its judicial knowledge, determine whether the space set apart upon a map for a street is correctly located upon the ground, or, when the line of such street as a boundary is disputed, fix it without evidence": *Diggins v. Hartshorne*, 108 Cal. 154, 158.

All courts of this state take judicial notice of what towns are established by law as the county seats of the respective counties of the state: *Cole v. Seagraves*, 88 Cal. 103, 105; *People v. Etting*, 99 Cal. 577, 579.

The court will take judicial notice that there can be no employment by the state without authorization from the law-making power; and as it is further chargeable with knowledge of all the public and private acts of the legislative, executive, and judicial departments of the state, a complaint alleging employment by the state must be regarded as presenting to the



court whatever of authority there may exist in the law for his employment to the same extent as if such authority were expressly alleged: *Mullan v. State*, 114 Cal. 578, 581.

“It is true, as a general proposition, with reference to proceedings in the courts of superior or general jurisdiction, that municipal ordinances are regarded as private statutes, and must be pleaded and proved. In this state, however, even in the superior courts, it is sufficient to refer to them by title and date of passage, whereupon the court must take judicial notice of them. But when a proceeding is in the municipal court, instituted for the express purpose of enforcing the municipal ordinances, and vested with full jurisdiction for that purpose, the rule ought to be and is different. In such case, the ordinances are the peculiar law of that forum, and it is bound to take notice of their existence,” even though not pleaded: *Ex parte Davis*, 115 Cal. 445, 447.

The court will take judicial notice that the city of San Diego is incorporated: *Bryan v. Abbott*, 131 Cal. 222, 225.

Supreme court knows judicially that San Francisco is the only city and county of the state of California: *Staude v. Election Commrs.*, 62 Cal. 313.

Supreme court takes judicial notice of the ownership by the United States of the mineral land: *Belcher v. Deferrari*, 62 Cal. 495.

Judicial notice will be taken of county boundaries and of the location of lands described by government subdivisions, and the legal subdivisions thereof: *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81.

Of boundaries of city defined by act of incorporation, and of public surveys: *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 258, 46 Am. St. Rep. 237, 39 Pac. 610; *Faekler v. Wright*, 86 Cal. 210, 24 Pac. 996.

The court will take judicial notice of the intended area of a quarter section under the system adopted by the United States for surveying and marking out its public lands; and whenever a claim is made that

**Judicial Notice—Contents of Records.**

The court cannot take judicial notice that a counter-claim pleaded in the answer had been formerly adjudicated in a separate action thereon, brought by the defendant against the plaintiff, or dispense with formal proof of such adjudication: *Stanley v. McElrath*, 86 Cal. 449, 35 Pac. 16.

A court will not take judicial knowledge of the contents of its records in former actions or proceedings: *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243.

The court in which an action is pending cannot take judicial notice of proceedings in bankruptcy subsequently commenced, however seriously they may affect the rights of the parties to the suit. It is the duty of the court to proceed to a decree, as between the parties before it, until by some proper pleading in the case it is informed of the changed relations of any of those parties to the subject matter of the suit: *Amador Canal etc. Co. v. Mitchell*, 59 Cal. 168.

Courts will take judicial notice of their records and officers, and, when necessary for the administration of justice in a given case, will take such notice of all previous and undisputed proceedings therein appearing of record, certified or authenticated as required by law and required by law to be on file or of record in the cause: *Hollenbach v. Schnabel*, 101 Cal. 312, 40 Am. St. Rep. 57, 35 Pac. 872.

The supreme court is bound to take judicial notice of its own decisions, though not made part of the record of the case before it, and when for any cause it reverses a proceeding had in a court below, it may look into its own records, for the purpose of ascertaining what instruction, if any, it is proper to give to the court below: *Sharon v. Sharon*, 84 Cal. 424.

The court takes judicial notice of the proceedings in an action pending before it, upon a proceeding therein for contempt: *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380.

A petition for partial distribution of the estate of a deceased testator may be presented by several legatees and devisees, and is not defective because it describes the petitioners as "heirs at law." The pro-

ceeding for partial distribution is but a step in the administration and the court takes judicial notice that the petitioners are devisees and legatees under the will: *Estate of Crocker*, 105 Cal. 368, 38 Pac. 954.

“No possible injury can result to the defendants from allowing the plaintiff to put in evidence statutes of which the court were bound to take judicial notice”: *People v. Hager*, 52 Cal. 171, 188.

The courts will take judicial notice of census returns: *People v. Williams*, 64 Cal. 87, 91.

The court will take judicial notice of the filing of the state census returns with the Secretary of State, at the date of their filing and that the returns establish the enumeration as of the date of the commencement of the census: *People v. Wong Wang*, 277, 280.

“Certainly, if a duty is imposed upon a judge by statute or any law, and it is necessary to procure information as to matters of fact from another judge to enable him to discharge that duty intelligently, and no means are provided by statute by which he can obtain the information, he can legally resort to inquiry of such judge. This comes within the range of inquiry allowed to a court or judge in matters of judicial knowledge”: *Cummings v. Conlan*, 66 Cal. 403, 412.

A decision by a federal court in a case between the same parties, involving the same cause of action, is taken judicial notice of by the state court: *Sharon v. Sharon*, 79 Cal. 633, 697.

If there is any variance between an act as found in the printed volume of statutes, and the original, as enrolled and deposited with the Secretary of State, the latter must prevail, as the court takes judicial notice of the original: *McLaughlin v. Menotti*, 105 Cal. 572, 574.

All other courts are bound to take judicial notice that the supreme court of the United States is the ultimate tribunal for the interpretation of an act of Congress, and also of what they decide: *S. P. R. R. Co. v. Painter*, 113 Cal. 247, 256.

The court will take judicial notice of the time of the approval of each act, and may resort further to

the office of the Secretary of State, to learn the exact time thereof: *Davis v. Whidden*, 117 Cal. 618, 623.

' Where the levee was constructed along the west side of the Los Angeles river to the southern charter boundary of the city, the boundaries of which are defined in the act of incorporation by reference to the public surveys of the United States, and the lands of plaintiff are described in the complaint by reference to those surveys, the court will take judicial notice of the boundaries of the city, and of the relative situation of the plaintiff's land to those boundaries and to the levee constructed by defendants: *DeBaker v. Southern California Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

#### **Judicial Notice of the Measure of Time.**

Court will take judicial notice of days of week and of month and of the date of the maturity of an installment falling due under a mortgage described in the complaint: *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000.

On the trial of an information for burglary, the district attorney was permitted to read in evidence Doctor Ayer's American Almanac for 1882 to prove the time when the sun rose on the morning of the alleged offense. Held, the fact for the proof of which the almanac was offered was one of those facts of which a court may take judicial notice; formal proof of it was therefore unnecessary: *People v. Chee Kee*, 61 Cal. 404.

The court may instruct the jury that the moon rose at a certain time on a certain night: *People v. Mayes*, 113 Cal. 618, 625.

#### **Matter of Common Knowledge.**

No testimony is required upon matters which are presumably within the knowledge or observation of all men of common intelligence: *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72.

Courts will take judicial notice of the time of harvest in the counties where they preside: *Mahoney v. Aurrecochea*, 51 Cal. 429; and see *Haines v. Snedigar*, 110 Cal. 18, 23, 42 Pac. 462.

Of the time of the rising of the sun on a given day: *People v. Chee Kee*, 61 Cal. 404.

To satisfy the mind of the court in regard to this latter fact, it was held competent to introduce Ayer's American Almanac: *People v. Chee Kee*, 61 Cal. 404.

Time of the rising of the moon: *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

Court will take judicial notice of days of week, and of month and of the date of the maturity of an installment falling due under a mortgage described in the complaint: *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000.

Court cannot take judicial notice as to conditions of soil, climate, topography, and rainfall: *Santa Cruz v. Enright*, 95 Cal. 105, 115, 30 Pac. 197.

The court will take judicial notice that the end of the calendar year is not the season for the gathering of fruit crops: *Brown v. Anderson*, 77 Cal. 236, 19 Pac. 487.

Where a complaint for negligence in the construction of a levee causing injury to plaintiff's land is not definite and specific in itself in regard to the relative situation of the plaintiff's land and the levee constructed by defendants, its deficiencies may be supplied as against a general demurrer, by the aid of facts of which the courts take judicial notice: *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 39 Pac. 610.

Courts are bound to take notice of political and social condition of country which they judicially rule: *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113.

The courts of California take judicial notice that coin was always treated as the standard of value in that state, and was so recognized by the legislature: *Estate of Sanderson*, 74 Cal. 199, 15 Pac. 753.

The court will take judicial notice of the history of a county as to the times and places of holding courts: *Ross v. Austill*, 2 Cal. 183.

#### **Miscellaneous Subjects of Judicial Notice.**

Courts take notice that Napa valley is in the state of California: *People v. Smith*, 1 Cal. 13.

Of the situation and boundary of the Potrero: *Brumagim v. Bradshaw*, 39 Cal. 40.

But the court will not take judicial notice that certain land was originally included in the Point San Jose Military Reservation, which by act of Congress was conveyed to the city and county of San Francisco: *Palmer v. Galvin*, 72 Cal. 183, 13 Pac. 476.

Courts will take judicial notice of the streets of San Francisco, of their relation to each other and their location, and that a crossing where an improvement was located necessarily forms a part of the public street: *Williams v. Savings etc. Coc.*, 97 Cal. 122, 31 Pac. 908. Compare *People v. McGregor*, 88 Cal. 140, 26 Pac. 97, and cases there cited.

They will take judicial notice of streets established by acts of legislature, but not of streets established by dedication or municipal ordinance: *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283.

The courts will take judicial notice that a road district alleged to be in Humboldt County is in the state of California: *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. 710.

When the tide ebbs and flows at New Orleans: *Irwin v. Phillips*, 5 Cal. 147, 63 Am. Dec. 113.

The court will take judicial notice of the filing of the state census returns with the Secretary of State at the date of their filing, and that the returns establish the enumeration as of the date of the commencement of the census: *People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270.

The court will take judicial knowledge whether any county in the state has a population which places it in a specified class, and what number of counties belong to a particular class: *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66.

#### **Matters not Taken Judicial Notice of.**

Judicial notice will not be taken of the location of lands designated simply by name, or by reference to a private survey: *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000.

The supreme court does not take judicial notice of the rules of the district courts. When a party relies on such rules, he should have them incorporated in the record: *Cutter v. Caruthers*, 48 Cal. 178; *Sweeney v. Stanford*, 60 Cal. 363.

Court cannot know judicially that employment of high-priced broker is necessary, or proper and usual in the ordinary course of business, to get a contractor to enter into a contract for building a flume: *Harris v. San Diego Flume Co.*, 87 Cal. 526, 25 Pac. 758.

The question as to the location of the streets named by the witness is not a strict question of judicial knowledge: *People v. McGregor*, 88 Cal. 140, 26 Pac. 97.

Appellate court will not presume what are rules of court below when they are not in the record: *Warden v. Mendocino County*, 32 Cal. 655.

The court has no judicial knowledge of the character of merchandise usually kept in country stores, and evidence is proper upon that point to enable the court, in interpreting the language of the policy, to understand the matter to which it relates, and the circumstances under which it was made: *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 44 Pac. 189.

The court cannot take judicial notice in an action of ejectment that the land in question is part of the pueblo lands which were confirmed to the city of San Francisco by the decree of the circuit court of the United States; nor can the court judicially know that the defendant's claim to the demanded land is derived through the decree of the circuit court: *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18.

If a board of brokers have rules which are not rules or usages of trade or commerce that would be recognized without their adoption by the board, the court will not take judicial notice of them unless they are pleaded: *Goldsmith v. Sawyer*, 46 Cal. 209.

The court cannot judicially know how the game of "keno" is played, or that it is a percentage game prohibited by section 330 of the Penal Code; and a defendant convicted of playing that game for money in violation of a municipal ordinance, will not be re-

leased upon habeas corpus, where the lack of jurisdiction under the ordinance is not made to appear: *In re Murphy*, 128 Cal. 29, 60 Pac. 465.

The court cannot judicially notice that the defendant is a resident of a foreign country merely because he affixes a title of nobility to his name: *De Tolna v. De Tolna*, 135 Cal. 575, 67 Pac. 1045.

Judicial notice is not, in general, taken of foreign law: *Wickersham v. Johnston*, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89; but compare *Ex parte Spears*, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608, as to mode of proving law of another state.

The doctrine of judicial notice does not authorize a court to say as a matter of law that a certain dam was an encroachment upon certain rights, arguing from certain conditions and seasons as observed in its own experience: *Coleman v. Le Franc*, 137 Cal. 214, 216.



## CHAPTER II.

## WITNESSES.

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- § 1882. [Repealed.]
- § 1883. Judge and jurors as witnesses.  
Juror as witness.  
Grand juror as witness.
- § 1884. Interpreters.  
Interpreters as witnesses.  
What is proper form of interpretation.  
Appointment of interpreters.

**§ 1878. Witness Defined.**

A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

*Cross-references:*

Number of witnesses necessary, section 1844; who may be witnesses, section 1879; who may not, section 1880; privileged communications, section 1881; judge or juror as witnesses, section 1833; examination of witnesses, section 2042 et seq.; deposition, sections 1916, 2019; affidavits section 2009 et seq.; testimony of witnesses how taken, section 2002; deposition defined, section 2004; oral examination defined, section 2005; affidavit defined, section 2003.

See Jones on Evidence, section 730.—Competency of witnesses—Oath.

**Felons as Witnesses.**

Even convicted felons are competent witnesses: Willard v. Superior Court, 82 Cal. 456, 464; People v. Willard, 92 Cal. 482, 485.

**Interpreters are Witnesses.**

An interpreter is a witness in every sense of the word, and subject to all of the rules governing witnesses: People v. Lem Oeo, 132 Cal. 199, 201.

**§ 1879. Who are Competent Witnesses.**

All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an

action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section 1847.

*Cross-references:*

Who are incompetent as witnesses, section 1880; privileged communications, section 1881; judge and juror as witnesses, section 1883; credibility of witnesses is question for jury, section 1847, and see cross-references under that section; of what witnesses may testify, section 1845; one witness sufficient to prove fact, section 1844; conviction of felony to impeach witness, sections 2051, 2065; witness to testify of his own knowledge, section 1845; credibility of witness is question for jury, section 1847, and see cross-references under that section; evidence may be given to determine credibility of witness, section 1868, section 1870, subdivision 16; evidence of accomplices, section 2061, division 4; form of oath of non-Christian, section 2096; parties may not be witnesses in actions against executors, section 1880, subdivision 3.

See Jones on Evidence, sections 743-750, 734-736, 730-733.

Interest in the result, section 743.

Nature of the interest necessary to disqualify—How removed, section 744.

Parties formerly incompetent witnesses, section 745.  
Exceptions to the ancient rule—Practice in equity, section 746.

Parties were not compelled to testify for the adversary—Rule in criminal cases, section 747.

Effect of statutes on competency of parties as witnesses, sections 748, 749.

Competency of parties—Corporators, section 750.

Infamy as a ground of incompetency, section 734.

Same—Effect of crime committed in foreign countries, section 735.

Disability—How proved—How removed, section 736.

Competency of witnesses—Oath, section 730.

Objection to competency for want of belief—How raised, section 731.

Former rule—How changed by statutes, section 732.

Oath or equivalent still required, section 733.

### **Interest Formerly Disqualified a Witness from Testifying.**

People v. Elyea, 14 Cal. 144; People v. Hall, 4 Cal. 399; People v. Awa, 27 Cal. 638; People v. Howard, 17 Cal. 63; People v. McGuire, 45 Cal. 56; People v. Washington, 36 Cal. 658; Spur v. See Yup Co., 13 Cal. 73; People v. Brady, 40 Cal. 198, 6 Am. Rep. 604; Cravens v. Dewey, 13 Cal. 40; Wright v. Carillo, 22 Cal. 595; Parge v. O'Neal, 12 Cal. 483; Klockenbaum v. Pierson, 22 Cal. 160; Realare Monte etc. Co. v. Thompson, 22 Cal. 542; Perlberg v. Gorham, 10 Cal. 120; Dreux v. Domec, 18 Cal. 83; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237; Smith v. Richmond, 19 Cal. 476; Tomlinson v. Spencer, 5 Cal. 291; Johnson v. Carry, 2 Cal. 33; Kimball v. Gearhart, 12 Cal. 27; McCabe v. Hand, 18 Cal. 496; Jones v. Lore, 9 Cal. 68; Coghill v. Boring, 15 Cal. 213; Jones v. Post, 4 Cal. 14; McEwen v. Johnson, 7 Cal. 258; Hick v. Whitesides, 18 Cal. 700; Lisma v. Early, 12 Cal. 282; Abrams v. Howard, 23 Cal. 388; Mott v. Smith, 15 Cal. 533; Elgin v. Hill, 27 Cal. 372; Bear River etc. Co. v. Boles, 24 Cal. 359; Brook v. Crosby, 22 Cal. 42; People v. Anderson, 26 Cal. 129; Bearle v. Corilland, 2 Cal. 237; Tabor v. Staniels, 2 Cal. 240; Reddington v. Waldon, 22 Cal. 185; Bradley v. Kent, 22 Cal. 169; Bagley v. Eaton, 10 Cal. 126; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Easterly v. Bassignano, 20 Cal. 389; Hall v. Bark Emily Banning, 33 Cal. 522; Bard v. Dorn, 22 Cal. 133; Leet v. Wilson, 24 Cal. 398; Bradley v. Kent, 22 Cal. 169; Lucas v. Payne, 7 Cal. 92; Buckley v. Manife, 3 Cal. 441; Beach v. Corilland, 2 Cal. 237; Washburn v. Alden, 5 Cal. 463; Johnson v. Henderson, 3 Cal. 368; Sparks v. Kohler, 3 Cal. 299; Nightengale v. Scannell, 6 Cal. 506, 65 Am. Dec. 625; Domingo v. Getman, 9 Cal. 97; Fair-

child v. Armsbaugh, 22 Cal. 572; Dupey v. Leavenworth, 17 Cal. 262; Rosenbaum v. Hernberg, 17 Cal. 602; Jones v. Dore, 9 Cal. 68; Tuolumne County Water Co. v. Columbia etc. Co., 10 Cal. 395; Drake v. Eaton, 10 Cal. 312; Turner v. McIlhaney, 8 Cal. 575; Dwinelle v. Henriquez, 1 Cal. 387; Tomlinson v. Spencer, 5 Cal. 291; Mills v. Beard, 19 Cal. 158; Shaw v. Davis, 5 Cal. 466; Finn v. Vallejo St. Wharf Co., 7 Cal. 253; Live Yankee Co. v. Oregon Co., 7 Cal. 40; Towdy v. Ellis, 22 Cal. 650; Adams v. Words, 8 Cal. 306; Caulfield v. Sanders, 17 Cal. 568; Smith v. Truebody, 2 Cal. 341; Gray v. Garrison, 9 Cal. 325; Peterie v. Bugbey, 24 Cal. 419; Allen v. Citizens' Nav. Co., 6 Cal. 400; Coghill v. Boring, 15 Cal. 213; Caulfield v. Landers, 17 Cal. 569; Lockwood v. Canfield, 20 Cal. 126; Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 54; Brodek v. Ellis, 26 Cal. 145; Griffin v. Alsop, 4 Cal. 406; Shawl v. His Creditors, 19 Cal. 597; Blackwell v. Atkinson, 14 Cal. 470; Howe v. Scannell, 8 Cal. 325; Waugenheim v. Childs, 23 Cal. 444; Johnson v. Parks, 10 Cal. 446; Packer v. Heaton, 9 Cal. 568; Columbus Co. v. Dayton Co., 18 Cal. 615; Grady v. Early, 18 Cal. 108; Rowe v. Bradley, 12 Cal. 226; McCormick v. Barley, 10 Cal. 230; Vance v. Collins, 6 Cal. 435; Palmer v. Tripp, 6 Cal. 82; Bryant v. Watriss, 13 Cal. 85; Soule v. Darves, 6 Cal. 473; Priest v. Bounds, 25 Cal. 188; Smith v. Richmond, 19 Cal. 476; Mayo v. Avery, 18 Cal. 309; Blen v. Bear River etc. Co., 20 Cal. 602, 81 Am. Dec. 132; Wolf v. St. Louis Independent Water Co., 15 Cal. 319; Tuolumne County Water Co. v. Columbia etc. Water Co., 10 Cal. 193; McAuley v. York Min. Co., 6 Cal. 80; Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265; Price v. Dunlap, 5 Cal. 483; Appeal of Brooks, 32 Cal. 558; Peralta v. Castro, 6 Cal. 354.

### **Interest is no Disqualification Now.**

Persons having an interest in the event of the action are competent witnesses: See Warren v. McGill, 103 Cal. 153, 37 Pac. 144. The parties to suit are competent witnesses: Beal v. Stevens, 72 Cal. 451, 458.

**Convicts.**

Conviction of felony does not render the person incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property: Pen. Code, sec. 675.

One who has been convicted of felony may testify: *People v. McLane*, 60 Cal. 412.

**Accused as Witness.**

A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding: Pen. Code, sec. 1323.

Under the code a person accused of crime may voluntarily become a witness for or against himself at preliminary examination, and, if it appears that his testimony was voluntary and free from undue influence, it may be used in evidence against him on his subsequent trial for the offense: *People v. Kelly*, 47 Cal. 125, 126.

The right of a defendant in a criminal case to testify in his own behalf is found in the general provision of section 1879 of the Code of Civil Procedure relating to the competency of witnesses: *People v. Hitchcock*, 104 Cal. 482, 486.

**Legitimacy—Husband and Wife Incompetent on Issue as to.**

The incompetency of a husband or wife to testify to the illegitimacy of a child born during their cohabitation—the husband not being impotent—is not qualified by the general provisions making interested parties competent witnesses: *Estate of Mills*, 137 Cal. 298, 302.

**Party as Witness—Credibility.**

Where the defendant in a criminal prosecution has been examined as a witness in his own behalf, it is

not error to instruct the jury that he had a right to do so, and that they were to consider his testimony as they would that of any other witness; but that they should bear in mind the position of the defendant, the manner in which he would be affected by their verdict, and the very great interest he must feel in the result of the trial, and how it might affect his credibility or color his testimony: *People v. Faulke*, 96 Cal. 17, 30 Pac. 837.

Where a defendant is a witness in his own behalf, it is not error for the court to instruct the jury that in weighing his evidence they must consider the circumstances under which he testified, being the defendant in the case, and having such important interests dependent upon the result: *People v. Wheeler*, 65 Cal. 77, 2 Pac. 892. Cited 20 Nev. 409.

A charge to the jury that while the defendant and two other persons, who were also charged with the same offense, were allowed to testify, yet their testimony is not entitled to the same consideration as the testimony of persons not charged with crime, if not error, is at least on the verge of error, where it appears that only the prosecuting witness had testified against the three, and his testimony is subject to unfavorable criticism: *People v. Murray*, 86 Cal. 31, 24 Pac. 802.

It is an invasion of the province of the jury so to instruct them as to give a different rule for weighing the evidence of the witnesses for the defendant generally from that which was applied to the prosecuting witness, and discriminating against the former as to the probability of their evidence: *People v. Murray*, 86 Cal. 31, 24 Pac. 802.

Where the court instructed the jury in respect to the weight and effect proper to be given to defendant's evidence, who had testified at the trial in his own behalf that "in addition to noticing his manner and the probability of his statement, taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, and the consequences to him relating to the results of this trial, and all the in-



duancements and temptations which would ordinarily influence a person in his situation. If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." Held, that there was no error: *People v. Cronin*, 34 Cal. 191; *People v. Nichols*, 62 Cal. 518; *People v. Morrow*, 60 Cal. 142; *People v. O'Neal*, 67 Cal. 378, 7 Pac. 790.

An instruction to the jury in a criminal action, directing their attention to the fact that the defendant had offered himself as a witness on his own behalf, and saying to them that in considering the weight and effect to be given to his evidence, in addition to noticing his manner and the probability of his statements that they could consider his relation to the case, and the circumstances under which he gave his testimony, the consequences to him resulting from the verdict in the case, and all the inducements and temptations which would ordinarily influence a person in his situation having been sanctioned under the old constitution, must be considered as a part of a similar provision of the constitution of 1879, and cannot be held erroneous. It would be better, however, to entirely omit such instruction from those asked and given on behalf of the prosecution in the future: *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45.

On the trial the defendant testified as witness in his own behalf. The court instructed the jury that, in weighing his testimony, they should consider his position, the manner in which he might be affected by the verdict, and the very grave interest he must feel in it, and whether this position and interest might not affect his credibility and color his testimony; but that they should weigh the testimony fairly, and give it such credit as they thought it ought to receive. Held, that the instruction was proper: *People v. Knapp*, 71 Cal. 1, 11 Pac. 793.

Statute declaring that when defendant in criminal case becomes witness in his own behalf the credit to be given to his testimony must be left solely to the jury, under instructions of the court, does not establish a new rule for defendants in criminal cases, but

simply applies to them a rule which exists as to other witnesses: *People v. Rodundo*, 44 Cal. 538.

Court need not, of its own motion, instruct jury as to credit to be given to his testimony if defendant, in criminal case, becomes witness in his own behalf, and gives testimony tending to exonerate himself: *People v. Rodundo*, 44 Cal. 538.

Upon the trial of a defendant charged with murder, an instruction to the jury, asked by the defendant, to the effect that the defendant was a competent witness, and that it was the duty of the jury to weigh, examine, and take his testimony into consideration, "the same as it does the testimony of all the other witnesses in the case," is properly modified by striking therefrom the words "the same as it does the testimony of all the other witnesses in the case": *People v. Cowgill*, 93 Cal. 596, 29 Pac. 229.

In a criminal case, where the defendant has testified to his own innocence, and another person arrested for the same offense, who has confessed his own guilt, has testified that the defendant took no part in the offense, an instruction stating the former rule, which excluded the testimony of persons accused of crime, and the ground of such exclusion, but that the modern notion is the other way; that they have a right to be heard, and to have proper weight given to their testimony, and no more, but that they do not stand in the same position as a witness who is entirely disinterested; that the time has not yet come when men who confess themselves guilty of crime are to stand alongside of, and made equal to, men who have lived upright and honest lives, but that the value of their testimony is to be entirely estimated by the jury, is not erroneous, though just on the verge of error: *People v. Ferry*, 84 Cal. 31, 24 Pac. 33.

#### **Rule in Criminal Cases.**

The rules for determining the competency of witnesses in civil actions are applicable, also, to criminal actions and proceedings, except as otherwise provided in this code. Pen. Code, sec. 1321.

**Persons Jointly Charged as Witnesses.**

When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant: Pen. Code, sec. 1100.

When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged that he may be a witness for the people: Pen. Code, sec. 1099.

When two or more persons are jointly indicted, and jointly to be tried, and the district attorney desires to use one of them as a witness for the people, and makes an application to the court for his discharge for that purpose, the court may, before this defendant has gone into his defense, discharge him from the indictment. But, unless all these things concur, to wit, a joint indictment, a joint trial, an application on the part of the district attorney that the defendant be discharged, to be used as a witness for the people, before he has gone into his defense, the court has no power to direct a defendant to be discharged from the indictment: *People v. Bruzzo*, 24 Cal. 41.

Where one of two or more defendants jointly indicted and jointly on trial, at the request of the district attorney, but without any compulsion, takes the stand as a witness for the people, and voluntarily takes the oath, and his counsel objects to his being instructed by the court that he need not say anything to criminate himself, and then, without any objection being made, or exception taken, voluntarily gives testimony criminating both himself and his codefendants, this furnishes no ground for discharging the defendant who testified from the indictment, or for arresting the judgment, and if erroneous, as no exception was taken, the supreme court cannot review the error: *People v. Bruzzo*, 24 Cal. 41.

Discharge of prisoner that he may be witness against others must be made at the trial, before the defendant has gone into his defense, by the court, either of its own motion or upon the application of the district attorney: *People v. Indian Peter*, 48 Cal. 250.

#### **Attorney as Witness.**

The prosecuting attorney, who is in a situation to know facts tending to show guilty knowledge of the defendant, may be allowed, in the interest of justice, to testify thereto: *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298.

There is no rule of law which prohibits an attorney of record, who is a witness in a case, from summing it up before the court or jury. If a rule of the court prohibits such an attorney from arguing a case without permission of the court, the court may give such permission: *Branson v. Caruthers*, 49 Cal. 375.

#### **Witness in Criminal Case Where Name not on Indictment.**

It is not error for court to permit witness to be sworn for the prosecution, although his name was not indorsed on the indictment: *People v. Bonney*, 19 Cal. 426; *People v. Symonds*, 22 Cal. 348; *People v. Lopez*, 26 Cal. 112.

A witness, not examined before grand jury, whose name is not indorsed on the indictment, may be examined by the people on the trial: *People v. Jocelyn*, 29 Cal. 562.

The rule seems to be that any witness may be introduced on the trial by consent of the court, notwithstanding he was not before the grand jury, subject only to the right of the prisoner to a postponement, in case such evidence should operate as a surprise upon him: *People v. Freeland*, 6 Cal. 96.

#### **Religious Belief Does not Affect Competency.**

A witness is competent without respect to his religious sentiments or conviction, the law leaving his competency to legal sanctions, or, at least, to con-

siderations independent of religious sentiments or convictions: *Fuller v. Fuller*, 17 Cal. 605. Cited 43 Cal. 34.

This rule applies to dying declarations. The common-law rule in this respect is abrogated: *People v. Sanford*, 43 Cal. 29.

A witness cannot be impeached by a showing that he is a person without religious belief: *People v. Copsey*, 71 Cal. 548, 550.

#### **Nationality or Color Does not Affect Competency.**

No witness can be excluded in any case on account of nationality or color: *People v. Maguire*, 45 Cal. 57.

#### **Witness Convicted of Crime.**

A witness who has been convicted of the crime of burglary, and served out a term of imprisonment for such crime, is not thereby, as a matter of law, rendered a witness not entitled to full credit. It is a question for the jury, and an instruction by the court predicated upon such erroneous theory, is not proper: *People v. McLane*, 60 Cal. 412, 413.

#### **Witness before Notary Public.**

A person swearing before a notary that he is the party named in a deed as grantor, is acting properly in the capacity of a witness, and is guilty of perjury if he falsely swears: *Ex parte Carpenter*, 64 Cal. 267, 270.

#### **Party Liable to Conviction as Witness.**

A party whose testimony is liable to subject him to a conviction of felony is a competent witness, and therefore must be sworn. His condition gives him a privilege of which he may avail himself when a question is asked him from which the question of his privilege may be determined: *Ex parte Stice*, 70 Cal. 51, 54.

### **§ 1880. Who are Incompetent Witnesses.**

The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person. [Amendment approved April 16, 1880; Amendments 1880, p. 112. In effect April 16, 1880.]

*Cross-references:*

See Jones on Evidence, section 737.

Subdivision 1.

Incapacity as a ground of incompetency—Idiots—Mutes, section 737.

Subdivision 2, sections 738, 739.

Incapacity—Want of age, section 738.

Mode of determining capacity of children—The tests to be applied, section 739.

Subdivision 3, sections 790-795.

Competency of witnesses as to transactions with deceased persons—Statutes, section 790.

Nature of the disqualifying interest, section 791.

Waiver under the statutes, section 792.

Meaning of the term "transaction," section 793.

Transactions with partners or agents or in the presence of third persons, section 794.

Further applications of the rule, section 795.

**Rule of Construction as to Competency.**

Restriction upon competency of witness must be strictly construed in favor of life, liberty, and public justice: *People v. Awa*, 27 Cal. 638.

**Children Under Ten.**

The qualification of a boy nine years of age to testify as a witness for the prosecution was a question for the trial court, which had the boy before it, and its determination will not be disturbed where there is nothing to show any error or abuse of discretion: *People v. Daily*, 135 Cal. 104, 67 Pac. 16.

The determination of the judge that a boy under ten years of age is competent as a witness after examination upon objection raised to his competency is not subject to review, and the fact that the testimony of the child differed from that of other witnesses is not prima facie evidence of his incompetency: *People v. Craig*, 111 Cal. 460, 44 Pac. 186.

There is no precise age within which children are excluded from giving testimony. Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge: *People v. Bernal*, 10 Cal. 66.

It is essential that children should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath: *People v. Bernal*, 10 Cal. 66.

It is for the court to decide the question of the competency of children when they are offered as witnesses: *People v. Bernal*, 10 Cal. 66.

If over fourteen years of age, the presumption is that children possess the requisite knowledge and understanding to be witnesses; but, if under that age, it was formerly the rule that the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and in its presence, before they can be sworn: *People v. Bernal*, 10 Cal. 66.

A child of nine years of age was examined as a witness on the part of the prosecution. His testimony was taken without a preliminary examination as to his competency, but at the close of his testimony, and before he left the witness-stand, the court examined him in the presence of the defendant and the jury touching his competency, and found him to be competent. On a previous trial of the case the witness had been examined, and his competency established before he was permitted to testify. There was no error prejudicial to the defendant: *People v. Welsh*, 63 Cal. 167.

That a child, for an assault upon whom defendant is being tried, not having sufficient capacity to be a witness, was sworn and questioned, but withdrawn before she had testified to any material fact, is no ground for granting a new trial. The suggestion that her appearance was calculated to excite the sympathy of the jury and influence their judgment is not entitled to any consideration: *People v. Graham*, 21 Cal. 261.

The determination of the judge that a boy under ten years of age is competent as a witness after examination upon objection raised to his competency is not subject to review, and the fact that the testimony of the child differed from that of other witnesses is not *prima facie* evidence of his incompetency: *People v. Craig*, 111 Cal. 460, 44 Pac. 186.

Where a witness, being sworn, stated that he was fourteen years old and a Chileno, and did not know "the obligation of an oath," whereupon the judge explained to him the nature of such obligation, and he was then permitted to testify, the other party objecting that he did not know the obligation of an oath, held, that the witness was competent: *Fuller v. Fuller*, 17 Cal. 605.

The admission of the testimony of a young girl, as the prosecuting witness, against an objection for want of sufficient age, is discretionary; and where the court had examined the witness upon a previous trial, and then became satisfied as to her competency, it was not necessary to re-examine her upon a succeeding



trial; and where the defendant did not ask for a re-examination, or for the privilege of examining her as to her competency, it is no abuse of discretion to admit her testimony: *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186.

The competency of a young boy six years old as prosecuting witness is for the trial court to determine, after a preliminary examination without the hearing of the jury to test his intelligence, and where such examination disclosed his capacity to understand what was done to him, and to relate it truly, the discretion of the trial court cannot be said to have been abused in allowing his testimony: *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

#### **Actions Against Executors—When Rule Applies.**

A witness who acknowledges that he has an interest in a claim in suit against the estate of a decedent, to the extent of a certain commission expected for his services as an agent of plaintiff, and who has acknowledged in writing that he is jointly interested with plaintiff in the contract sued upon, is disqualified from testifying to facts occurring before the death of the decedent: *Uhlhorn v. Goodman*, 84 Cal. 185, 23 Pac. 1114.

Where, by agreement, the assignee is to pay the fees of the assignor's attorney, the attorney in an action against the assignee's administrator cannot testify against the administratrix of the deceased assignor to an agreement made between the assignor, the assignee, and the plaintiff, to the effect that the plaintiff should continue to prosecute the suit upon the assigned note as attorney for the assignor, and be paid a reasonable fee out of the proceeds of the judgment, if collected, nor can he testify to any matters of fact occurring before the death of the assignor: *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196.

The statute prohibiting a party from being a witness "where the adverse party, or the party for whose immediate benefit the action is prosecuted or defended, is the representative of a deceased person," etc., ex-

tends to all cases, even where there was no privity or connection between him and the plaintiff, or those through whom he claims: *Satterlee v. Bliss*, 36 Cal. 489.

Section 1880 applies not only to parties who have an interest adverse to the estate, but to all nominal parties to the action: *Blood v. Fairbanks*, 50 Cal. 420.

In an action against two joint obligors, one of whom has died after suit brought, and whose administrator has been substituted in his place and has answered, denying the obligation, neither the plaintiff nor the surviving obligor, against whom judgment by default has been rendered, is competent as a witness, upon the trial of the issues raised by the administrator, to prove the obligation, or to testify to any facts which occurred prior to the death of the deceased obligor: *Moore v. Schofield*, 96 Cal. 486, 31 Pac. 532.

The section of the code prohibiting parties to an action or proceeding against an executor or administrator upon a claim against the estate from being witnesses, applies not only to parties who have an interest adverse to the estate, but also to all nominal parties to the action: *Blood v. Fairbanks*, 50 Cal. 420, 422.

In an action brought against an executor upon a claim against the estate the deposition of the plaintiff cannot be read in evidence since the date of its passage of section 1880 of the Code of Civil Procedure, even if the deposition itself was taken before said section was passed: *Mitchell v. Haggemeyer*, 51 Cal. 108, 109.

The plaintiff being incompetent to testify against an administrator upon a claim or demand against the estate of a deceased person as to any fact occurring prior to the death of such person, is incompetent to contradict the evidence of a witness as to admissions made by her prior to such death, that the amount of the debt was smaller than that now claimed: *Stuart v. Lord*, 138 Cal. 672, 676.

**Actions Against Executors — When Rule does not Apply.**

Action to enforce resulting trust against the personal representatives of a deceased trustee is not founded upon a claim or demand against the estate of the deceased, within the meaning of section 1880 of the Code of Civil Procedure. In such an action the original cestui que trust may testify to facts occurring prior to the death of the trustee: *Meyers v. Reinstein*, 67 Cal. 89, 7 Pac. 192.

Section 1880 does not prevent the plaintiff in such an action from testifying as to the correctness of the books of account which had been wholly kept by him preparatory to their introduction in evidence: *Roche v. Ware*, 71 Cal. 375, 60 Am. Rep. 539, 12 Pac. 284.

The disqualification of a party or his assignor to testify against an executor or an administrator, upon a claim or demand, against the estate of a deceased person, as to any matter occurring before his death, does not apply to agents or persons employed by the party or his assignor; and in an action by a bank against an administrator upon a money demand, the officers of the bank are not disqualified: *City Sav. Bank v. Enos*, 135 Cal. 167, 169.

Under section 1880 of the Code of Civil Procedure, providing that parties to an action or proceeding against an executor or administrator upon a claim or demand against the estate of a deceased person cannot be witnesses therein as to any matter of fact occurring before the death of such deceased person, the incompetency is only limited and partial, and the parties may testify as to any facts occurring subsequent to the death of the deceased: *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

In an action by a husband against the personal representative of the deceased debtor to recover the wife's earnings, the wife is a competent witness for her husband, since the wife's earnings are community property: *Moseley v. Heney*, 66 Cal. 478, 6 Pac. 134.

That testimony of conversations with deceased person, when admissible, is nevertheless very weak evi-

dence, if unsupported, see *Mattingly v. Pennie*, 105 Cal. 514, 523, 45 Am. St. Rep. 87, 39 Pac. 200.

An action by indorsee of a firm, one of the members of which is deceased, and who was also a payee and indorser of the note, against a copayee and co-indorser of the note, upon his liability as indorser, is not within this section and the defendant is a competent witness to testify to facts occurring before the death of the decedent: *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733.

When a plaintiff prosecutes a joint action for the value of services rendered by his assignor upon a demand against the representatives of a decedent and a codefendant, the plaintiff's assignor, though not a competent witness against such representatives to prove his employment by the decedent, is competent to testify against the codefendant against whom a several judgment might be rendered: *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198.

In an action by an attorney at law against an executor or administrator for professional services rendered to the deceased person, the plaintiff may testify as to incidental matters respecting his practice and income, which cannot be said to have occurred before the death of the deceased. The purpose of section 1880 of the Code of Civil Procedure is to prevent parties from testifying to matters tending to establish the claim or demand, and not to prevent their testifying to other matters which may arise incidentally. Nor is such a plaintiff precluded by his incompetency as a witness from reading to the jury in his argument the claim and verification thereof attached to the complaint and made part thereof: *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698.

An action by a widow to quiet her title to land conveyed to her by her husband during his lifetime, as against his administrator, is not an action "upon a claim or demand against the estate of the deceased," within the meaning of section 1880 of the Code of Civil Procedure; and she may testify in such action that the deed was delivered to her by her husband

in his lifetime: *Poulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73, 55 Pac. 605.

In an action upon an account with a deceased person, brought against his executor, inquiries of the plaintiff as a witness, as to whether anything had been paid to him since the death of the decedent, on account of any services rendered by him to deceased during his lifetime, if he rendered any such services, and whether, if any balance of account was due to him upon such death, such balance still remains unpaid, do not relate to matters occurring prior to the death of the deceased, and do not fall within the prohibition of section 1880 of the Code of Civil Procedure: *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.

Books of account kept by the deceased, if not containing proof of the payment of plaintiff's claim, may be looked to for evidence of the negative fact of non-payment by the deceased during his lifetime; and notwithstanding the inhibition of section 1880 of the Code of Civil Procedure, the foundation for the introduction of such account-books, if kept by plaintiff for the deceased, may be laid by the testimony of the plaintiff: *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.

The introduction of a note by a plaintiff as administratrix of an estate with the indorsements of payments made thereon by the decedent, is not making the decedent a witness, and subdivision 3 of section 1880 of the Code of Civil Procedure does not apply: *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993.

Action to enforce mechanic's lien is in the nature of a proceeding in rem, in which no personal judgment can be recovered against the estate of the deceased owner payable in due course of administration, and the lien is not a "claim" against the estate within the meaning of subdivision 3 of section 1880 of the Code of Civil Procedure: *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

In an action to foreclose the lien of subcontractors against the owner of a building, the death of the

owner, and the substitution of his administrator, as a party defendant, does not render the plaintiffs incompetent to testify as witnesses upon the trial of the cause: *Joost v. Sullivan*, 111 Cal. 286, 43 Pac. 896.

The third subdivision of section 1880 of the Code of Civil Procedure providing that "parties to an action or proceeding or in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of the deceased," cannot be witnesses, has no application to a party claiming a family allowance: *Estate of McCausland*, 52 Cal. 568.

Section 1880 of the Code of Civil Procedure, which prohibits parties to an action in which a claim is made against an estate from testifying, is not to be construed as prohibiting an executor or administrator from calling a party to the action to testify in behalf of the estate: *Chase v. Evoy*, 51 Cal. 618.

In an action by the personal representative of a deceased person to enforce a demand due the estate of the decedent, the defendant is a competent witness as to transactions between himself and the decedent: *McGregor v. Donnelly*, 67 Cal. 149, 7 Pac. 422.

The section of the Code of Civil Procedure which prohibits parties in whose favor an action is prosecuted against an estate from being witnesses, does not prohibit a person against whom an action is prosecuted by an executor on a claim in favor of an estate from being a witness in their own favor: *Sedgwick v. Sedgwick*, 52 Cal. 336; *McGregor v. Donnelly*, 67 Cal. 149, 152.

### **Actions Against Distributees.**

The prohibition upon testimony as to acts occurring prior to the death of the deceased, cannot be evaded by suing the distributees after an estate has been settled: *Nicholson v. Tarpey*, 124 Cal. 442, 450.

### **§ 1881. Privileged Communications.**

There are particular relations in which it is the policy of the law to encourage confidence and to

preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity;

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs;

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined

in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient;

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. [Amendment approved March 23, 1893; Stats. 1893, p. 301. In effect immediately.]

*Cross-references:*

Subdivision 1. Presumption of marriage, section 1963, subdivision 30; confessions in actions for divorce, section 2079.

Subdivision 3. Confession in action for divorce, section 2079.

Subdivision 5. Presumptions as to official duty, section 1963, subdivision 15.

See Jones on Evidence, subdivision 1, sections 751-753, 765.

Husband and wife incompetent as witnesses, section 751.

Same—Illustrations of the common-law rule, section 752.

The rule in criminal cases—Same, section 753.

Same—Confidential communications, section 754.

Duration of the disability, section 755.

Matters which may be disclosed after the marriage relation ceases, section 756.

Same—Actions for criminal conversation—May the objection be waived, section 757.

Exceptions—Agency, section 758.

Proof of the agency, section 759.

Evidence of husband and wife tending to criminate or contradict the other—Collateral proceedings, section 760.

Other exceptions to the general rule—Divorce, section 761.



The marriage to be proved by the party objecting, section 762.

Effect of statutes on the subject, section 763.

Same—Continued, section 764.

General tendency of the statutes, section 765.

The rule in criminal cases—Same, section 753.

Subdivision 2, sections 766-775.

Attorneys not allowed to disclose confidential communications, section 766.

Same—The privilege that of the client—Not confined to cases pending, section 767.

Same—Duration — Client may claim the privilege—Extends to writings, section 768.

Communications must be in the nature of professional intercourse, section 769.

Same—Privilege does not extend to information gained in a casual manner, section 770.

Privilege not allowed in furtherance of crime, section 771.

Attorney may be witness for client—Litigation between attorney and client, etc., section 772.

Instructions for drawing wills, section 773.

Waiver of the privilege, section 774.

Statutes on the subject, section 775.

Communications must be in the nature of professional intercourse, section 769.

Subdivision 3, section 776.

Communications to clergymen, section 776.

Subdivision 4, sections 777-779.

Communications between physician and patient—Statutes, section 777.

Confined to information gained in the performance of professional duty, section 778.

Waiver of the privilege, section 779.

Subdivision 5, section 780.

Privileged communications—Affairs of state, section 780.

**Grand Juror.**

On a motion to set aside an indictment, a grand juror cannot be required to answer a question as to how he

voted upon the finding of the indictment, and his refusal to do so is not a contempt of court: *Ex parte Sontag*, 64 Cal. 525, 2 Pac. 402.

#### **Witnesses Before Grand Jury.**

The obligation of secrecy imposed on grand jurors is due and owing to the public, and not the witnesses who testify before them; and such witnesses cannot take advantage of this obligation in a criminal prosecution against them: *People v. Young*, 31 Cal. 563.

#### **Husbands and Wives as Witnesses.**

In an action by a husband against the personal representative of the deceased debtor to recover the wife's earnings, the wife is a competent witness for her husband: *Mosely v. Heney*, 66 Cal. 478, 6 Pac. 134.

A party, by the examination of her husband as a witness on her behalf, waives her objection to his examination by the opposite party upon any of the issues in the action: *Steinburg v. Meany*, 53 Cal. 425.

Section 1881 of the Code of Civil Procedure, providing that "a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage," makes no exception, even though the other spouse be incapable of consent; and a deposition of the wife of an insane person is properly excluded as inadmissible: *Falk v. Wittram*, 120 Cal. 479, 65 Am. St. Rep. 184, 52 Pac. 707.

The delivery of a deed from a husband to a wife is not a privileged "communication" within the meaning of subdivision 1 of section 1881 of the Code of Civil Procedure: *Poulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73, 55 Pac. 605.

In a prosecution it is not error to permit the wife of the defendant, who was called as a witness for the state, to testify, without the consent of the defend-

ant, to the fact that she is his wife, and resided at the place where and at the time when the crime charged was alleged to have been committed, if the defendant, when a witness in his own behalf, testified to the same effect: *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040.

In an action to set aside fraudulent conveyance by deceased to his wife, his declarations to her at the time of conveyance, as to his purpose in making it are privileged; nor can the creditors or heirs waive the privilege; and his statements concerning the title to the property, made to her after the conveyance, are inadmissible against her: *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303.

The subdivision applies to all civil and criminal actions other than those expressly excepted: *People v. Warner*, 117 Cal. 637, 49 Pac. 841.

#### **Husband and Wife—Rule in Criminal Actions.**

Except with the consent of both, or in cases of criminal violence upon one or the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties: Pen. Code, sec. 1322.

The incompetency of a wife to testify for or against her husband in a criminal case is limited to cases in which one or both are parties: *People v. Langtree*, 64 Cal. 256, 30 Pac. 813.

Where two persons are charged by separate informations with the same offense, the wife of the one not on trial is a competent witness for the other touching matters implicating her husband. The incompetency of a wife to testify for or against her husband in a criminal case is limited to cases in which one or both are parties: *People v. Langtree*, 64 Cal. 256, 30 Pac. 813.

Subdivision 1 of section 1881 of the Code of Civil Procedure, protesting communications between husband and wife as privileged, except in a civil action or proceeding by one against the other and in a criminal action or proceeding, for a crime committed by

one against the other, applies to all civil and criminal actions, other than those expressly accepted; and a defendant accused of a crime cannot be properly questioned, upon cross-examination, as to communications made to his wife bearing materially upon the question of guilt: *People v. Warner*, 117 Cal. 637, 639.

Where a witness is called and objected to by the opposite party, on the ground that she is the wife of the party objecting, and he then proves by other witnesses that the two had cohabited for a long time as husband and wife, had passed in society as such, and had represented each other as husband and wife, and the party calling the witness introduces no testimony to the contrary, the witness should be objected to by the court: *People v. Anderson*, 26 Cal. 129.

If a witness is objected to on the ground that she is the wife of the party against whom she is called, and the party objecting proves by other witnesses facts sufficient to show that they are husband and wife, without proving an actual marriage, and the court then erroneously allows the witness to testify, and on cross-examination the party objecting draws out the fact that the witness is not the lawful wife of the party objecting, the party calling out this statement on cross-examination is concluded by it, and the previous error of the court is cured: *People v. Anderson*, 26 Cal. 129.

On a trial for murder, error in permitting the wife of the defendant to testify in favor of the prosecution, against his objection, is cured if the defendant subsequently voluntarily testifies to substantially the same effect: *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353.

A defendant cannot be cross-examined as to conversation occurring between him and one who was his wife at the time of the conversations, though she was afterward divorced. The code sweeps away all distinction between confidential and other communications between husband and wife, and extends the privilege to any communication made by one to the other during marriage; and no disclosure can be

forced from either spouse without the consent of the one against whom the disclosure is sought to be used. The privilege applies to the communication, however its disclosure may be sought: *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229.

**Marriage Relation Must Exist at Time of Communication.**

A woman who is living with defendant as his wife, but not married to him, is a competent witness against him: *People v. Alviso*, 55 Cal. 230.

**Burden of Showing the Communication to have been Confidential.**

It is upon the party seeking to suppress the evidence to show that it is within the terms of the statute: *Sharon v. Sharon*, 79 Cal. 633, 677, 22 Pac. 26, 131.

The rule given in the section has a tendency to prevent the full disclosure of the truth, and ought to be strictly construed: *Satterlee v. Bliss*, 36 Cal. 507.

**Communications Between Attorney and Client are Privileged.**

It is the policy of the law to encourage confidence between attorney and client, and to protect confidential communications between them from forced disclosure; nor can a client be compelled to disclose communications which his attorney cannot be permitted to disclose: *Verdelli v. Gray's Harbor Com. Co.*, 115 Cal. 517, 47 Pac. 364.

The plaintiff in an action for negligence cannot be compelled to state whether, when he consulted his attorney after the accident happened, he did not make a different statement to him as to the cause of the accident, from that made by him upon the witness-stand: *Verdelli v. Gray's Harbor Com. Co.*, 115 Cal. 517, 47 Pac. 364.

Confidential counselor, solicitor, or attorney of party cannot be compelled to disclose the communications made to him, or letters, or entries made by him in that capacity: *Landsberger v. Gorham*, 5 Cal. 450.

Communications from a client to his attorney, touching the subject matter under investigation, are, on principles of public policy, privileged, and are not admissible in evidence, even though the attorney may be willing to disclose them: *People v. Atkinson*, 40 Cal. 284.

**Attorneys—Communications not Privileged Where Attorney is not Acting as Attorney in the Particular Transaction.**

On the examination of a witness who has testified that he was the attorney for the defendant in another matter, and had acted as his friend in respect to the transfer of property in question, without a retainer, an objection merely denying the consent of the defendant for the witness to testify as to what occurred with relation to the negotiations or the part that he took in the negotiations of the sale, prior or subsequent to its date, is too general to avail the defendant. If there was any merit in the objection, its force is destroyed by the subsequent testimony of defendant that the witness was not his attorney in respect to the sale: *Schurtz v. Romer*, 82 Cal. 474, 23 Pac. 118.

A communication made to a person who is an attorney at law, but not the attorney or legal adviser of the party making it, is not privileged: *George v. Silva*, 68 Cal. 272, 9 Pac. 257.

The plaintiff, for the purpose of impeaching E., a witness for the defense, offered to prove certain communications made by E. to B., an attorney, who testified that he had incidentally done a great deal of business for E.; but there was no evidence that any professional counsel, advice, or aid had been solicited or given in relation to this particular property. Held, the communication was not privileged, and the court erred in excluding it: *Carroll v. Sprague*, 59 Cal. 655.

The testimony of a witness as to conversations with a party to an action, cannot be excluded on the ground that the witness was an attorney at law, and the communication was confidential, unless it appears

that he was the attorney for the party, and the communication was made in the course of professional employment: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Taylor v. Taylor*, 136 Cal. 92, 96.

An objection to the testimony of an attorney, that "it is not shown that he was not acting in the capacity of client to an attorney," is not sufficient to raise the question as to his competency to testify, and evidence given by him without objection to his competency was properly received.—*Taylor v. Taylor*, 138 Cal. 92, 68 Pac. 482.

When the attorney witness was unable to state whether admissions were made to him as counsel of an accused person, or whilst the latter was under examination as a witness in his own behalf, it was held that the court should have excluded the testimony of its own motion. The accused should have had the benefit of the doubt: *People v. Atkinson*, 40 Cal. 285.

Statement made to attorney in respect to matter concerning which he is not attorney of the party making the statement, or a statement made to an attorney, with the purpose of having it communicated to others, and not intended to be confidential, is not a privileged communication: *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518. See, also, *Schurtz v. Romer*, 82 Cal. 474, 23 Pac. 118.

#### **Attorneys—What Communications are not Privileged.**

An attorney may testify to the genuineness of a pass-book in the possession of his client, which was exhibited to him by the client, and which the attorney personally knew to be in the handwriting of the cashier of the banking company, defendant. Such evidence is not in reference to any privileged communication between the attorney and client, though he advised him with reference to the account: *Nicholson v. Randall Banking Co.*, 130 Cal. 533, 62 Pac. 930.

The testimony of the attorney was admissible to show his authority to stipulate for the default. His employment was not a "privileged communication," within the meaning of the statute: *Security L. & T. Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257.

A conversation between the husband and his attorney in reference to the delivery of his deed of gift to his wife to a third person, and instructions by the attorney as to such delivery, given mostly in the presence of the wife, are not privileged, and the husband's attorney may testify to the same on behalf of the wife: *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867.

Where the defendant had testified that he signed the note several months after its date, under the representation that it was a receipt for five dollars, and that he did not tell his attorney about it when first sued, a question as to when he did tell his attorney is not objectionable as asking for a confidential communication: *Tibbet v. Tom Sue*, 125 Cal. 544, 58 Pac. 160.

But statements made by the client to other persons, or by other persons to him, in the attorney's presence, are not privileged, and the attorney is bound to disclose them: *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

If a client, pending the relation, communicates to his attorney a fact foreign to the object for which the attorney was retained, the communication is not privileged, where the attorney is a party to the transaction; especially if it is a fraud or fraudulent transaction whether aware of the fraudulent intention or not: *Hager v. Shindler*, 29 Cal. 63.

While attorney will not be permitted to disclose the confidential communications of his client, yet, if he acquires information apart from, or independent of, such source, he is not protected from disclosing it: *Hunter v. Watson*, 12 Cal. 363, 377, 73 Am. Dec. 543.

Confidential communications made by a client to an attorney, respecting the business he is employed to transact, are privileged, and the attorney cannot be compelled to disclose them. But the statements made by the client, to other persons at the time, or by other persons to him, are not thus privileged; the attorney is bound to disclose them, the same as any other wit-



ness: *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

Statements made to attorney in respect to matter concerning which he is not attorney of the party making the statement, or a statement made to an attorney with the purpose of having it communicated to others, and not intended to be confidential, is not a privileged communication: *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518.

The rule excluding the testimony of an attorney as to confidential communications made to him by his client must be strictly construed, as it has a tendency to prevent a full disclosure of the truth: *Satterlee v. Bliss*, 36 Cal. 489.

If attorney, while managing suit, receives deed of client's property without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds: *Hager v. Shindler*, 29 Cal. 47.

Presumption is that all communications between attorney and client are confidential, but this presumption may be rebutted: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Taylor v. Taylor*, 136 Cal. 92, 96.

Whether a communication by a client to his attorney was made in confidence, is a question of fact to be disposed of by the court: *Hager v. Shindler*, 29 Cal. 47.

A communication made to a person who is an attorney at law, but not the attorney or legal adviser of the party making it, is not privileged: *George v. Silva*, 68 Cal. 272, 6 Pac. 257; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Taylor v. Taylor*, 136 Cal. 92, 96.

It must appear that communication was in fact confidential, or at least that it was so regarded at the time by the party making it: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Taylor v. Taylor*, 136 Cal. 92, 96.

The rule not permitting an attorney to testify to communications made to him by his client, as such, does not extend so far as to prohibit the attorney from stating by whom he was employed; neither does the rule prevent the attorney from testifying to communications made to him by his client, unless they are confidential communications made by the client in the course and for the purposes of the employment of the attorney: *Satterlee v. Bliss*, 36 Cal. 489.

#### **Attorney Acting for Both Parties.**

When lawyer acts as common attorney of two parties their communications to him are privileged, as far as concerns strangers, but as to themselves they stand on the same footing as to the lawyer, and either can compel them to testify against the other as to their negotiation: *Estate of Bauer*, 79 Cal. 304, 21 Pac. 759.

Where an attorney is acting for both parties in a negotiation, or where two persons are negotiating together, in the presence of the attorney of one of them, the communications made in the hearing of both parties are not privileged, but the attorney may be compelled in a suit between the parties to testify as to all that was said and done by them in his presence: *Murphy v. Waterhouse*, 113 Cal. 467, 54 Am. St. Rep. 365, 45 Pac. 866; *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867.

An attorney at law, who, at the time of a transaction in question, was acting as the attorney for both parties, is not within the rule prohibiting an attorney from testifying as to communications from his client, and he may properly testify respecting such transaction: *Harris v. Harris*, 136 Cal. 379, 69 Pac. 23.

#### **Waiver of Privilege—Requesting Attorney to Act as Subscribing Witness.**

When a testator requests his attorneys to sign a will as attesting witnesses, he, in effect, consents that whenever the will is offered for probate, they may be called as witnesses, and testify to any facts, within

their knowledge, necessary to establish its validity, and waives the requirement of secrecy: *Estate of Wax*, 106 Cal. 343, 39 Pac. 624.

Section 1881 of the Code of Civil Procedure, is designed to protect the interest of the client, whose privilege it is either to seal the lips of the attorney, or permit him to make disclosures of confidential communications, and where a testator has requested his attorney to become an attesting witness to his will, he thereby expressly waives the privilege: *Estate of Mullin*, 110 Cal. 252, 42 Pac. 645.

The consent of the client to the disclosure of communications made by him to his attorney, provided for by the terms of section 1881 of the Code of Civil Procedure, may be implied, as well as expressed: *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294.

#### **Privileged Communications—Attorney's Clerk.**

The rule as to the privileged communications between attorney and client also extends to the clerk of an attorney: *Landsberger v. Gorham*, 5 Cal. 450.

#### **Waiver of Objection.**

Where the evidence of an attorney who drew the will was offered in support of its validity, and objected to by the attorney of the contestant, upon the ground that the evidence offered called for confidential communications between client and attorney, and the objection was withdrawn, such withdrawal deprived the contestants of the right afterward to move to have the testimony stricken out, upon the ground that the statements made by the witness consisted of confidential communications made between attorney and client: *In re Wax*, 106 Cal. 343, 347.

#### **Clergy.**

The examination of a witness was confined to the facts which were brought to his knowledge on a preliminary examination, made with a view to learn whether the testatrix was in a proper condition of mind to make a confession. Held, that it was not a

privileged communication under section 1881 of the Code of Civil Procedure: *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83.

**Physician—When Privileged.**

The physician who attended the deceased after he received the injuries, which caused his death, cannot be questioned as to his knowledge of such injuries acquired in his professional capacity: *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 Pac. 771.

The physician who attended the testator during his last illness, and whose information as to his condition was acquired during such attendance for the purpose of prescribing for him as a physician, is incompetent to testify as to his condition, in answer to questions asked by the contestants, tending to show that the testator had not the mental capacity to make a will, or a codicil thereto: *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294.

The information which a physician acquires from his patient, for the purpose of prescribing for him, is given for the benefit of the patient alone, and not for the purpose of creating a right in others, and does not carry any implied request to disclose it in behalf of others in matters with which it is wholly disconnected: *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294.

Where a physician testified that he got no information of the deceased patient, except as a physician, to enable him to take care of her, he cannot, against objection, be questioned as to her mental condition: *In re Redfield*, 116 Cal. 637, 48 Pac. 794.

**Reason of the Rule.**

The object of section 1881 of the Code of Civil Procedure is to enable the patient to make a full statement of his physical infirmities to his physician, with the knowledge that the law recognizes the communications as confidential, and guards against the possibility of his feelings being shocked, or his reputation tarnished, by their subsequent disclosure: *In re Flint*, 100 Cal. 391, 34 Pac. 863.

**Rule Applies to Probate Contests.**

A contest arising upon the probate of a will is a "civil action" within the meaning of the subdivision: *In re Flint*, 100 Cal. 391, 34 Pac. 863.

**Who may Waive.**

Whether, as is held in New York, the patient alone can waive the privilege, was not decided; but it was held that an heir of a deceased patient, contesting the probate of the will with a devisee, cannot waive the privilege; he is not a representative of the deceased for that purpose: *In re Flint*, 100 Cal. 391, 34 Pac. 863.

An heir of a decedent, who contests the probate of a will with a devisee, is not the representative of the deceased, and cannot waive the privilege attaching to communications from the deceased to his physician: *In re Flint*, 100 Cal. 391, 34 Pac. 863.

A medical witness, who attended the deceased as a patient before his death, cannot give his opinion as to the cause of death, based upon facts ascertained by him during such medical attendance, in the absence of the "consent of his patient," expressly contemplated by section 1881 of the Code of Civil Procedure; nor is it competent for the legal representative of the deceased to waive the privilege, it being only in the power of the patient to waive it, and after his death the matter is forever closed: *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019.

**Physician—When not Privileged.**

The testimony of physicians in attendance on the deceased, as to her mental condition, not based upon any information acquired in attending upon her as a patient, which was necessary to enable the physician to prescribe or act for the patient, is not incompetent under section 1881 of the Code of Civil Procedure: *Estate of Black*, 132 Cal. 392, 64 Pac. 695.

Testimony of a physician as to a conversation between himself and the defendant, which was not "information acquired in attending the patient which was necessary to enable him to prescribe or act for

the patient," cannot be rejected as a "confidential communication": *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845.

The testimony of a physician, of whom the deceased had not been a patient in his lifetime, as to an autopsy of the body of the deceased, attended by him after death, and as to what was disclosed by the autopsy as to the inducing cause of death, is admissible, and is not within the inhibition of section 1881 of the Code of Civil Procedure, a dead man not being a "patient" capable of sustaining the relation of confidence toward his physician which is the foundation of the rule given in the statute: *Harrison v. Sutter Street Ry. Co.*, 116 Cal. 156, 47 Pac. 1019.

Where the physician who attended the decedent was put upon the stand by the plaintiff to describe his ailments, and testified, upon cross-examination, as to his mental status, and that he was thoroughly rational and competent, without objection taken to such cross-examination, all objection on the part of the plaintiff to the competency of his evidence is waived, and it cannot be struck out on plaintiff's motion without the consent of the defendants: *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317.

The action was brought by a wife for a divorce on the ground of cruelty. On the trial, a physician, who had acted professionally for each of the parties, was called as a witness for the plaintiff, and asked a hypothetical question as to the effect which would probably result to the plaintiff, in the condition in which he found her, from the acts of the defendant, which constituted the alleged cruelty. The plaintiff thereupon released the witness from any obligation of secrecy, but he refused to answer, on the ground that he might be compelled on cross-examination to reveal professional secrets confided to him by the defendant. Held, that the question did not concern a privileged matter, and that the court erred in not compelling an answer: *Valensin v. Valensin*, 73 Cal. 106, 14 Pac. 397.

Where an attending physician and surgeon who attended the deceased during his last sickness was

made a subscribing witness to the will, the testator thereby waived the privilege of confidential communications to the physician accorded by subdivision 4 of section 1881 of the Code of Civil Procedure, and the witness is thereby rendered competent to testify as to the mental sanity and physical condition of the testator: *Estate of Mullin*, 110 Cal. 252, 42 Pac. 645.

#### **Physician—Rule in Criminal Cases.**

The rule as to privileged communications between patient and physician is limited to civil actions, and does not apply in criminal cases: *People v. West*, 106 Cal. 89, 39 Pac. 207.

The rule as to privileged communications between patient and physician does not apply to criminal cases. The privilege was not conferred to shield a person charged with the murder of another, or to be used as a weapon against one charged with crime: *People v. Lane*, 101 Cal. 513, 36 Pac. 16.

#### **Benefit, How Claimed.**

The party claiming the benefit of the statute excluding the testimony of a physician as incompetent to testify, under subdivision 4 of section 1881 of the Code of Civil Procedure, must seasonably exercise the privilege by objecting to the evidence at the time it is offered: *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317.

Where the plaintiff in an action for injury from fall of an elevator had testified that, after the fall of the elevator, he was taken to the office of a physician, and gave testimony respecting the examination and treatment given him by such physician, and the physician was called for the defense and testified, without objection of plaintiff, respecting his examination of plaintiff and the remedies used, and the nature of his injuries, the failure of the plaintiff to object thereto was a waiver of objection, and an implied consent to the evidence, which could not be revoked: *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688.

**No Privilege Where Relation of Physician and Patient Does not Exist.**

It is proper for a physician to testify, in an action for damages for personal injury, as to information acquired by him of the physical condition of the party injured, if he has visited such injured party upon the suggestion of the defendant, and stated to her that he came there solely and entirely at the request of the defendant to ascertain the nature and character of her injuries, for the purpose of reporting them to defendant, and confines his conduct to such examination and report; yet where it appears that he continued to visit and prescribe for her, and that the information acquired by him was obtained by visiting her at her request and prescribing for her, such evidence, if objected to by her, is properly excluded: *Freel v. Market Street Cable Ry. Co.*, 97 Cal. 40, 46.

**Evidence Objected to as Privileged is not "Suppressed."**

Evidence ruled out upon objection that it is a privileged communication between physician and patient cannot be considered as "suppressed" and thereafter adversely commented upon: *Thomas v. Gates*, 126 Cal. 1, 6.

**§ 1882.**

Repealed. [Amendments 1875-76, 105. In effect February 28, 1876.]

**§ 1883. Judge and Jurors as Witnesses.**

The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.



See Jones on Evidence, section 782—Judges privileged.

When a justice before whom a suit is pending is a witness, it is proper to transfer it: Sec. 833; Davis v. Gallen, 2 Cal. 360.

#### **Juror as Witness.**

Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry: Pol. Code, 1081.

If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declared a fact which could be evidence in the cause, as of his own knowledge, the juror must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties: Pol. Code, 1120.

Juror is not disqualified from becoming a witness in a proper case: People v. Doyell, 48 Cal 85.

#### **Grand Juror as Witness.**

On motion to set aside an indictment, a grand juror cannot be required to answer a question as to how he voted upon the finding of the indictment, and his refusal to do so is not a contempt of court: Ex parte Sontag, 64 Cal. 525, 4 Pac. 402.

The rule of secrecy of the proceedings before a grand jury is intended only for the protection of the grand jurors, and the witnesses before them cannot invoke it; and the fact that a person was called, sworn, and examined as a witness before the grand jury does not come within the rule of secrecy, and a grand juror may testify to such fact: People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

#### **§ 1884. Interpreters.**

When a witness does not understand and speak the English language, an interpreter must be

sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of a contempt.

*Cross-references:*

Witness to translate written instrument in foreign language, section 1863; subpoena, how served, sections 1987, 1988; proper county, section 1989; where person present in court, section 1990; punishment for disobedience, sections 1991, 1992; warrant to compel attendance, sections 1991, 1993.

See Jones on Evidence, section 267—Admissions by interpreters.

**Interpreters as Witnesses.**

A person who is a witness on a criminal charge is not, on that account, incompetent to act as interpreter at the examination of other witnesses in the case before the grand jury: *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

A person appointed to act as an interpreter on the trial of a criminal action is not disqualified by reason of the fact that he was a witness for the prosecution: *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323.

**What is Proper Form of Interpretation.**

Where the court, during the trial of a criminal case, instructs the interpreter that whenever the witness undertakes to state something that somebody else has told him he should inform the court, it would be error warranting a reversal of the judgment if it

appear that such instructions were acted upon, and that the interpreter merely reported to the court that the witness had stated something that had been told him by somebody, and the court had acted on the bare statement without requiring the interpreter to repeat what the witness had said: *People v. Wong Ah Bang*, 65 Cal. 305, 4 Pac. 19.

**Appointment of Interpreters.**

The court is vested with discretion as to granting or refusing the application of defendant for an interpreter at his preliminary examination: *People v. Young*, 108 Cal. 8, 41 Pac. 281.

## CHAPTER III.

### WRITINGS.

Article I. Writings in General.

II. Public Writings.

III. Private Writings.

### ARTICLE I.

#### WRITINGS IN GENERAL.

§ 1887. Kinds of writings.

Public writings—Petition filed with board  
of supervisors.

Public records of private writings.

§ 1888. Public writings.

§ 1889. Private writings.

§ 1887. Kinds of Writings.

Writings are of two kinds:

1. Public; and,
2. Private.

#### *Cross-references:*

Public writings defined, section 1888; private writings defined, section 1889.

See Jones on Evidence, chapters XVI and XVII.  
Documentary evidence, chapter XVI.  
Documentary evidence, chapter XVII.

**§ 1888. Public Writings**

Public writings are:

1. The written acts or records of the acts of the sovereign authority of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;
2. Public records, kept in this state, of private writings.

*Cross-references:*

Kinds of public writings, section 1894; written laws defined, section 1896; judicial records defined, section 1904; public records of private writings, section 1919; official documents, how proven, section 1918.

See Jones on Evidence, sections 512-557, 601-650.  
Documentary evidence—Definitions, etc., section 512.  
Exceptions to the rule that mere certificates are not evidence, section 557.

Effect of judgments—General rule, section 601.

Same—How far conclusive upon the officer—As to strangers, section 650.

**Public Records—Petition Filed With Board of Supervisors.**

A petition filed with the board of supervisors is a public record and is evidenced by a certified copy: *People v. Hagar*, 52 Cal. 171, 186.

**Public Records of Private Writings.**

Public records of private writings are evidenced by certified copies: *Canfield v. Thompson*, 49 Cal. 210, 212; *Gethin v. Walker*, 59 Cal. 502, 506.

**§ 1889. Private Writings.**

All other writings are private.

*Cross-references:*

Private writings conclusive, section 1929; original writing to be produced or accounted for, section 1937 and cross-references thereunder; how a writing may be proved, section 1940; acknowledgment of private writings, section 1948.

## ARTICLE II.

## PUBLIC WRITINGS.

- § 1892. Right to inspect public writings.
  - Right to inspect.
  - What are not public writings.
- § 1893. Public officer must furnish certified copies.
  - Lost instruments—Rule not affected by this section.
- § 1894. Classes of public writings.
- § 1895. Laws, how classified.
- § 1896. Written law defined.
- § 1897. Written laws.
- § 1898. Statutes, public and private.
- § 1899. Unwritten law.
  - Opinions of lower courts.
- § 1900. Books as evidence of written law.
- § 1901. Certified copies of public writings.
  - Certified copy of act of Congress.
  - Foreign law is a matter of fact.
- § 1902. Foreign unwritten law.
  - Testimony of witnesses as to foreign unwritten law.
  - Laws of sister state presumed how.
- § 1903. Recitals in public statutes.
  - Recitals in public statutes.
- § 1904. Judicial record defined.
  - What is a judicial record.
- § 1905. Judicial record, how proved.
  - Judicial records in general.
  - Judicial records as evidence.

Judicial records not proved by judicial notice.

When records must be produced.

Judicial records of sister states.

Transcript of probate minutes.

Meaning of attestation.

Judicial record not affected by manner of production.

§ 1906. Judicial records of foreign countries.

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§ 1907. Copy of foreign judicial record.

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§ 1908. Effect of judgment.

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§ 1910. When parties deemed the same.

Rule applies to depositions.

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§ 1911. What becomes res adjudicata.

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Section is declaratory of common-law rule.

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§ 1914. Judicial records of foreign courts of admiralty.

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- § 1919. Public records of private writings.  
Certified copies of recorded writings.
- § 1920. Entries in official records.  
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Duty specially enjoined by law.  
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- § 1921. Transcript from docket of justice of the peace.  
Justice's court of sister states.  
Justice's docket.
- § 1922. Certificate to transcript of justice of the peace.  
Justice may prove his jurisdiction.
- § 1923. Contents of certificates.  
Form of certificate.
- § 1924. Sister states includes United States and territories.
- § 1925. Certificate of purchase as evidence.  
Certificate in prima facie evidence.  
Certificate of purchase.  
Land office certificates.
- § 1926. Official entries.

**§ 1892. Right to Inspect Public Writings.**

Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.



*Cross-references:*

Public records not to be removed from the office where kept, section 1950; inspection of private writings, section 2054.

**Right to Inspect.**

The public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any citizen of this state. In all actions for divorce, the pleadings and the testimony taken and filed in said actions shall not be by the clerk with whom the same is filed, or the referee before whom the testimony is taken, made public, nor shall the same be allowed to be inspected by any person except the parties that may be interested, or the attorneys to the action, or by an order of the court in which the action is pending; a copy of said order must be filed with the clerk. In cases of attachment, the clerk of the court with whom the complaint is filed shall not make public the fact of the filing of such complaint, or of the issuing of such attachment, until after the filing of return of service of attachment. (Amendment approved March 30; Amendments 1873-77, p. 14. In effect July 6, 1874.) Pol. Code, 1032.

**What are not Public Writings.**

A written charge made to a board of supervisors, a board of directors, or trustees of a college or other state institution, upon being filed in the office of the custodian of their record, does not necessarily become a public record to which any citizen may have access at pleasure: In the Matter of Colnon v. Orr, 71 Cal. 43, 11 Pac. 814.

The instructions by the attorney of an execution creditor to the sheriff, regarding the enforcement of the execution, are in the nature of the private directions of the principal to his agent, and are not included in "public record and other matters in the office" of the sheriff, which are required to be "open to the inspection of any citizen": Whelan v. Superior Court, 114 Cal. 548, 550.

### § 1893. Public Officer Must Furnish Certified Copies.

Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing. [Amendment approved March 24, 1874; Amendments 1873-74, p. 381. In effect July 1, 1874.]

#### *Cross-references:*

Certified copy of law of public writing, when admissible, section 1901; certified copy of judicial record, section 1905; official certificate must state, section 1923; certified copy of, record of conveyance as evidence, section 1951; certified copy of record of foreign country, section 1906; secondary evidence in general, section 1830, and cross-references thereunder.

#### **Lost Instruments—Rule not Affected by This Section.**

The books of a recorder's office are not admissible in evidence to prove the execution and contents of instruments which have been duly recorded, unless the absence of the originals is first duly explained: *Brown v. Griffith*, 70 Cal. 14, 15.

### § 1894. Classes of Public Writings.

Public writings are divided into four classes:

1. Laws;
2. Judicial records;
3. Other official documents;

4. Public records kept in this state, of private writings.

*Cross-references:*

Subdivision 1. Law defined, section 1895; written law defined, section 1896; organic law defined, section 1897; public and private statutes defined, section 1898; unwritten law defined, section 1899.

Subdivision 2. Judicial record defined, section 1904.

Subdivision 3. Other official documents, how proven, section 1918.

Subdivision 4. Public records of private writings, how proven, section 1919.

See Jones on Evidence, chapters XVI, XVII.  
Documentary evidence, chapter XVI.  
Documentary evidence, chapter XVII.

**§ 1895. Laws, How Classified.**

Laws, whether organic or ordinary, are either written or unwritten.

*Cross-references:*

Written law defined, section 1896; unwritten law defined, section 1899.

**§ 1896. Written Law Defined.**

A written law is that which is promulgated in writing, and of which a record is in existence.

*Cross-references:*

Organic law defined, section 1897; statutes defined, section 1897; public statutes defined, section 1898; private statutes defined, section 1898; courts take judicial knowledge of what is established by law, section 1875; books published under authority of sister state purporting to contain written law admissible in evidence, section 1900; presumption as to books purporting to be printed by public authority, section 1963, subdivision 35.

### § 1897. Written Laws.

The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this state is therefore contained in its constitution and statutes, and in the constitution and statutes of the United States.

#### *Cross-references:*

Public statutes defined, section 1898; private statutes defined, section 1898; presumption as to books published under authority of sister state and purporting to contain statutes, code and other written law, section 1900; printed book purporting to be printed by public authority was so printed, section 1963, subdivision 35; statutes how construed, sections 1858, 1859.

### § 1898. Statutes, Public and Private.

Statutes are public or private. A private statute is one which concerns only certain designated individuals and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

#### *Cross-references:*

Statutes defined, section 1897; written law defined, section 1896; statutes how construed, sections 1858, 1859; statutes may be proven by certified copy, sections 1901; recitals in statutes how far conclusive, section 1903.

### § 1899. Unwritten Law.

Unwritten law is the law not promulgated and recorded, as mentioned in section 1896, but which

is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and of the treatises of learned men.

*Cross-references:*

Classification of laws, section 1895; written laws defined, section 1896; unwritten law of foreign country may be proven by oral testimony, section 1902; printed books and reports of decisions of foreign country admissible to prove foreign unwritten law—section 1902; presumption as to reports of cases adjudged in foreign tribunals, section 1963, subdivision 36; court takes judicial knowledge of whatever is established by law, section 1875, subdivision 2.

**Opinions of Lower Courts.**

The opinion of the court below upon any question before it or upon the final determination of the cause constitutes no part of the record on appeal. It may be cited by counsel in argument, but it is not an act upon which error may be assigned, nor are its reasons binding on appeal; but if the appellate court finds that upon any ground or for any reason the action of the court below was correct, its action will be affirmed, regardless of the reason which the court may have given for it: *White v. Merrill*, 82 Cal. 14, 18.

**§ 1900. Books as Evidence of Written Law.**

Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, code, or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country, as evidence of the written law thereof, are admissible in this state as evidence of such law.

*Cross-references:*

Historical works are prima facie evidence of facts of general notoriety, section 1936; courts may resort to books to aid judicial knowledge, section 1875, ad fin.; presumption that printed and published book purporting to be printed or published by public authority was so printed or published, section 1963, subdivision 35; presumption that printed and published book purporting to contain reports of cases contains reports of such cases, section 1963, subdivision 36; sister state includes United States and territories, section 1924.

See Jones on Evidence, sections 514-517.

Proof of foreign laws, sections 514, 515.

Proof of laws of sister states—Statutes, sections 516, 517. •

**§ 1901. Certified Copies of Public Writings.**

A copy of the written law or other public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such law or writing. [Amendment approved March 24, 1874; Amendments 1873-74, p. 381. In effect July 1, 1874.]

*Cross-references:*

Statutes defined, section 1898; written law defined, section 1896; public writings classified, section 1894; what certificate to certified copy must contain, section 1923; executive acts and legislative proceedings of sister state may be proved by public volumes of statutes or certified copies, section 1918, subdivision 3; construction of statutes, sections 1858, 1859.

See Jones on Evidence, sections 514, 515.

Proof of foreign laws, sections 514, 515.

Proof of the laws of sister states—Statutes, sections 516, 517.

**Certified Copy of Act of Congress.**

A certified copy of a statute must be accepted as the authentic statute and expression of the legislative will, and, if there is any variance between an act of Congress as found in the printed volume of statutes and the original, as enrolled and deposited, with the Secretary of State the latter must prevail: *McLaughlin v. Menotti*, 105 Cal. 572, 38 Pac. 973.

**Foreign Law is a Matter of Fact.**

Any foreign law is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved: *Wickersham v. Johnston*, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89.

**§ 1902. Foreign Unwritten Law.**

The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state or country, or proved to be commonly admitted in such courts.

*Cross-references:*

Expert evidence, when admissible, section 1870, subdivision 9; presumptions as to printed volumes of reports, section 1963, subdivision 36; books in general, when admissible in evidence, section 1396; books admissible to aid knowledge of the court, section 1875, ad fin.; sister state defined, section 1924.

See *Jones on Evidence*, sections 514, 515, 370, 112-120.

Proof of foreign laws, sections 514, 515.

Expert testimony—Grounds of admission—Proof of qualifications of experts, section 370.

Law of the Forum—International Law—Foreign treaties, section 112.

Acts of Congress—Constitutions—Statutes of the state, section 113.

**§ 1905. Judicial Record, How Proved.**

A judicial record of this state, or of the United States, may be proved by the production of the original or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk, and the seal of the court annexed; if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

*Cross-references:*

Judicial record defined, section 1904; contents of certificate, section 1923; scope of term of sister state, section 1924; effect of judicial record as evidence, section 1908; judicial record, when conclusive, section 1962, subdivision 6; presumption as to judicial record when not conclusive, section 1963; subdivision 17; who bound by judicial record, sections 1848, 1908, 1909, 1910; effect of judicial record of sister state, section 1913; effect of judicial record of foreign country, sections 1914, 1915; impeachment of judicial record, section 1916.

See Jones on Evidence, sections 535-537, 643-647.

Copies of records—Different classes, section 535.

Examined and certified copies as evidence, section 536.

Effect of copies as evidence—Cannot exclude originals  
—By whom certified, section 537.

Proof of Records of sister states—Federal statutes, section 643.

Proof of judgments in federal courts, section 644.

Authentication—Attestation by clerk, section 645.

Same—Certificate of the judge, section 646.

Same—Seal, section 647.



**Judicial Records in General.**

Courts of such extended jurisdiction and grave responsibility as the district courts must, from the very nature of the case, be trusted as to the fidelity of their records, and their decision thereon is final and conclusive: *People ex rel. Galvin v. Judge of Tenth Judicial District*, 9 Cal. 19.

The records of courts are under the control of the judges so far as essential to the proper administration of justice, and this control is beyond the reach of legislation: *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

**Judicial Records as Evidence.**

The judgment and findings in a former action are inadmissible in evidence in a second action, unless accompanied by the judgment-roll: *Mason v. Wolff*, 40 Cal. 246.

When a judgment-roll is an original record of the court in which it is offered in evidence it requires no exemplification: *Clink v. Thurston*, 47 Cal. 21.

The records of court are only evidence to determine what orders have been made in an action: *Clark v. Crane*, 57 Cal. 629.

Decree of distribution and letters of administration are admissible in evidence, unaccompanied by the other parts of the record: *Koutz v. Van Clief*, 55 Cal. 345.

In an action of trover against an execution purchaser of the lessee's interest for conversion of the lessee's share of the crop it is error to exclude from evidence the judgment-roll in the action in which the execution was issued and levied upon the lessee's interest: *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 755.

**Judicial Records not Proved by Judicial Notice.**

Judicial notice is taken of judicial acts; but section 1905 of the Code of Civil Procedure provides a distinct method for bringing the attention of courts to decisions of other tribunals; to this extent, there-

fore, is the doctrine of judicial notice modified: *S. P. R. R. Co. v. Painter*, 113 Cal. 247, 256 (dissent).

#### **When Records Must be Produced.**

The unsupported evidence of plaintiff that he was born in France and naturalized in the city of New York, but had lost his naturalization papers, is not sufficient to establish the fact of citizenship: *Miller v. Prentice*, 82 Cal. 104, 23 Pac. 8.

In a contest of a right to purchase state land, the naturalization of an applicant cannot be proved by the great register of the country, nor by his personal testimony that he had been naturalized and had lost his naturalization papers. It can only be proved by production of the judicial record of naturalization, or a properly exemplified copy thereof, or by proof of the loss or destruction of the record: *Prentice v. Miller*, 82 Cal. 570, 23 Pac. 189.

#### **Judicial Records of Sister States.**

Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof: *United States Const.*, art. 4, sec. 1.

Under the act of Congress of May 26, 1790, an exemplification of a judgment of the court of common pleas of the city of New York, attested by the clerk under the seal of the court, and the presiding judge certifying that the attestation is in due form of law, was held sufficient: *Thompson v. Manrow*, 1 Cal. 428.

Under the provisions of the above section of the constitution of the United States, it is competent for Congress to prescribe the manner in which the public acts, records, and judicial proceedings of the several states shall be proved, and the effect thereof. While it is clear that a legislature of a state could not require a greater amount of proof than that prescribed by act of Congress, it would seem clear that a statute of a state may require less, and that such an act would not be in derogation of the constitution of the United States: *Parke v. Williams*, 7 Cal. 249.

Under the act of Congress it is only necessary that the certificate should state the main facts which are made necessary by the act, when the offices of judge and clerk are both vested in one person. A certificate of the proceedings of the surrogate's court of New York, which states that A. W. Bradford is surrogate of the city and county of New York, and acting clerk in the surrogate's court; that he has compared the transcript of the papers with the original records in the matter of the estate of William Young, and finds the same to be correct, and a true copy of all the proceedings, and that the certificate is in due form of law, in testimony whereof he sets his hand and affixes his seal of office, is sufficient: *Low v. Burrows*, 12 Cal. 181.

A judgment signed "presiding justice," with the seal of the court annexed, was held sufficient, *Bean v. Loryea*, 81 Cal. 151, 22 Pac. 513.

For other cases where a judgment of a foreign state was held sufficient in this state, see *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661; *Dore v. Thornburgh*, 90 Cal. 64, 25 Am. St. Rep. 100; *Weir v. Vail*, 65 Cal. 466, 4 Pac. 422.

In an action on a judgment rendered in another state, error in the manner of entering the judgment will not be reviewed: *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833.

Judgment-book competent evidence, on loss of judgment-roll: *Simmons v. Threshour*, 118 Cal. 100, 50 Pac. 312.

### **Transcript of Probate Minutes.**

A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked shall have the same effect in evidence as the letters themselves: *Code Civ. Proc.*, sec. 1429.

**Meaning of Attestation.**

Section 1906 of the Code of Civil Procedure refers to exemplified copies of an original record, and not to the original record itself, and the word "attestation" used in that section is used in its secondary or technical sense, to denote the certification by the keeper of a record or the verity of a copy: *Wickersham v. Johnson*, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89.

**Judicial Record not Affected by Manner of Production.**

An original judgment-roll of another county, offered to impeach a witness, is not rendered incompetent by reason of the fact that it was illegally taken from the clerk's office of such county without an order of court allowing its removal, nor does its competency as evidence in any way depend upon the means by which it is brought to the court where it is offered in evidence: *People v. Alden*, 113 Cal. 264, 45 Pac. 327.

**§ 1906. Judicial Records of Foreign Countries.**

A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the

United States in such foreign country. [Amendment approved March 24, 1874; Amendments 1873-74, p. 382. In effect July 1, 1874.]

*Cross-references:*

Judicial record defined, section 1904; form of certificate, section 1923; effect of judicial record of foreign country, sections 1914, 1915; impeachment of judicial record, section 1916; who bound by judicial record, see cross-references under section 1905; other methods of proving judicial record of foreign country, section 1907; foreign depositions, section 2024, et seq.; foreign affidavits, sections 2014, 2015.

See Jones on Evidence, sections 641, 642.

Mode of proof of foreign records, section 641.

Same—Mode of authentication, section 642.

**Foreign Judicial Records.**

A copy of a judicial record of the admission of a will to probate, in the probate division of her majesty's high court of justice in England, certified as correct by the registrar of the court, accompanied by the certificate of the judge to the official position of the registrar as to the custodian of its records and the genuineness of his signature, and also by a certificate of the United States consul general to the genuineness of the signature of the judge, made in accordance with the requirements of section 1906 of the Code of Civil Procedure, is admissible in evidence; but, in the absence of proof of a procedure in England different from that of our own courts, such exemplified copy of the pleadings, petitions or proceedings which led up to the order and gave jurisdiction to make it, are also introduced in evidence to make the record complete: *Wickersham v. Johnson*, 104 Cal. 409, 43 Am. St. Rep. 118, 38 Pac. 89.

A foreign judgment without a statement of the cause of action in some form recognized by law cannot be given in evidence: *Young v. Rosenbaum*, 39 Cal. 654.

**§ 1907. Copy of Foreign Judicial Record.**

A copy of the judicial record of a foreign country is also admissible in evidence, upon proof;

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

*Cross-references:*

Judicial record of foreign country may be proven by attestation of clerk, etc., section 1906; impeachment of judicial record, section 1916; who bound by judicial record, see cross-references under section 1905; other methods of printing judicial record of foreign country, section 1907; foreign depositions, section 2024, et seq.; foreign affidavits, sections 2014, 2015.

See Jones on Evidence, sections, 641, 642.

Mode of proof of foreign records, section 641.

Same—Mode of authentication, section 642.

**Insufficient Proof of Foreign Probate.**

A foreign will admitted to probate in this state on insufficient evidence of its foreign probate, is open to attack only on appeal. The probate is not void. It is only erroneous, and therefore, not open to collateral attack in a subsequent action of ejectment: *Goldtree v. McAllister*, 86 Cal. 93, 102.

**§ 1908. Effect of Judgment.**

The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person;

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice actual or constructive, of the pendency of the action or proceeding. [Amendment approved March 24, 1874; Amendments 1873-74, p. 382. In effect. July 1, 1874.]

***Cross-references:***

Judicial record defined, section 1984; judicial record of this state, how proven, section 1905; judicial record of sister state, how proven, section 1905; ju-

dicial record of foreign country, how proven, sections 1206, 1907; judicial order other than judgment or final order create disputable presumption, section 1909; who bound by judicial record, section 1848, sections 1909, 1910, 1912, 1962, subdivision 6; presumption as to judicial record when not conclusive, section 1963, subdivision 17; judicial record, how impeached, section 1916; judicial records are public writings, section 1888, subdivision 1; record of conviction of felony to impeach witness, section 2051, subdivision 1; jurisdiction to sustain a record, section 1719; would deem adjudicated, sections 1911, 1963, subdivision 18.

Subdivision 1. Jurisdiction to sustain a record, section 1719; would deem adjudicated, sections 1911, 1963, subdivision 18.

Subdivision 2. Who bound by judgment, section 1848; jurisdiction sufficient to sustain judgment, section 1917; what deemed adjudged, section 1911 and section 1963, subdivision 18; judgment, when presumed conclusive, section 1962, subdivision 6; when parties deemed the same, section 1910; judgment is conclusive evidence between parties, sections 1836, 1837.

See Jones on Evidence, sections 623, 627.

Judgments in rem as evidence, section 623.

Same—Judgment of divorce, sections 624, 625.

Judgments in probate—Conclusive effect of—proof of death, etc., section 626.

Same—Jurisdiction, section 627.

Effect of judgment—General rule, section 601.

As to what persons judgments are conclusive, section 602.

Effect of judgments on persons in privity with each other, sections 603, 604.

### **Judgments in Rem.**

Where P. R. contests the petition of R. P. for letters of administration, and bases his action on the question of his illegitimacy and recognition by the deceased, an adjudication adverse to his claim of recognition is conclusive on a subsequent hearing of his own petition for letters of administration: *Estate of Pico*, 56 Cal. 413, 420.



Under our system, the probate court has jurisdiction to settle the accounts of an administrator, and to ascertain and determine his liability to the estate; and the decree of that court settling the accounts and fixing the amounts of liability is conclusive. Accordingly, where the final account of an administrator, upon his resignation, was settled and approved, and he was discharged; and afterward an action was brought against him by his successor for neglect and failing to bring suit within the period prescribed by the statute of limitation, for land in the possession of adverse claimants whereby the land was lost, *held*, that if the defendant had incurred any liability, it was full and complete at the time of the settlement of his final account, and might then have been ascertained and determined; and that the order settling the account and discharging them was conclusive against his liability: *Reynolds v. Brumagim*, 54 Cal. 254, 257.

Where A sells his interest in an estate to B but gives no deed, a distribution to A is conclusive against B in favor of a creditor subsequently attaching: *Freeman v. Rahm*, 58 Cal. 111-114.

A judgment rejecting a will on the ground of insanity is not conclusive of the question of sanity in a subsequent cause of action founded directly on an allegation of insanity: *Gridley v. Boggs*, 62 Cal. 190, 201.

Proceedings for the revocation of the probate of a will must be commenced in the court in which the will was proved, within one year after the probate. If the validity of the will or its probate be not contested within that time, the validity and probate become final and conclusive upon all parties interested in the estate, except infants and persons of unsound mind: *Estate of Giovanni Sbarbaro*, 63 Cal. 5, 6.

A distribution in probate to the heirs of a disseisee does not bar the right of the disseisor to plead the statute of limitations: *Bath v. Baldez*, 70 Cal. 350, 361; *Barnard v. Wilson*, 74 Cal. 512, 515.

Where a decree of partition of certain land alleged to form part of the estate of a decedent is rendered

by the probate court, a party thereto is estopped from afterward asserting any other title derived from the decedent adverse to that of his cotenants under the decree: *Burroughs v. Coutts*, 70 Cal. 361, 371.

An order of a probate court allowing or disallowing a final account is a final settlement and adjudication of the matter of which it assumes to dispose, and cannot afterward be collaterally attacked or impeached in the same or any other court by the parties thereto or their privies: *Tobelman v. Hilderbrandt*, 72 Cal. 313, 315; *Washington v. Black*, 83 Cal. 290, 294.

Upon an application for letters of administration, where the right of the petitioner to administer is contested, her right thereto depending solely upon the issue as to whether or not she is the child of the deceased, the judgment of the court upon the hearing of a petition, if not reversed upon appeal, is a determination for all times and in all courts, as far as the parties to the proceeding are concerned, as to whether or not she is a child of the deceased, and therefore entitled to all of the estate, to the exclusion of kindred of the collateral line, or whether the collateral kindred are next in succession and entitled to the estate: *Howell v. Budd*, 91 Cal. 342, 349.

Where proceedings setting apart the homestead in the probate court are collaterally attacked in an action of ejectment, such collateral attack can only avail by showing errors which render the decree absolutely void, and not merely voidable: *Phelan v. Smith*, 100 Cal. 158, 171.

A decree of distribution which provides for the distribution of the property "subject to the claim of the administrator" for a sum named, is in effect a declaration that the property is charged with the payment of the sum named, and creates a lien therefor on the property by operation of law: *Finnerty v. Pennie*, 100 Cal. 404, 407.

The children of another deceased sister of the decedent in whose favor no express trust was declared by the distributee of the estate cannot enforce an involuntary trust against the distributee, the decree of distribution being conclusive as to the heirship of

the estate as against any collateral attack: *Lynch v. Rooney*, 112 Cal. 279, 287.

In an action brought by the attorney general in the name of the people upon relation of the previous incumbent of the office to oust the person elected for the unexpired term, the judgment rendered in an election contest annulling the previous election of the same person on the ground of ineligibility at suit of another elector, not a party to the quo warranto proceeding, is not admissible in evidence and cannot estop the defendant from proving his original ineligibility in that proceeding, there being no mutuality in the estoppel of the judgment, which does not bind the people: *People v. Rodgers*, 118 Cal. 393, 400.

The judgment rendered in an action brought under section 1664 of the Code of Civil Procedure to determine the heirship to the estate of the deceased husband, to which the successor in interest of the widow and her heirs claiming adversely to the estate was made a party but did not appear therein, does not conclude such person or his heirs in a subsequent action to determine adverse claims to the property: *McDonald v. McCoy*, 121 Cal. 55, 65.

A decree of distribution to trustees named in the will of a deceased person in pursuance of the provisions of the trust is conclusive as to the validity of the trust, and of all of its provisions: *Seymour v. McAvoy*, 121 Cal. 439, 444.

A decree of distribution, under which defendants entered into possession and claimed adversely, even if not regularly made and entered, is admissible in favor of the defendants, as showing color of title, under which they claimed, in support of adverse possession: *Bring v. Gregory*, 122 Cal. 480, 484.

A final decree of distribution, properly entered and not appealed from, is conclusive upon the question of heirship therein adjudicated, and cannot be collaterally assailed in any other action involving the question of the heirship of the decedent: *Quirk v. Rooney*, 130 Cal. 505, 508.

A final judgment in an action of divorce, in which no power is reserved to render any further relief, is

conclusive of the rights of the parties, as to the relief granted, as well as to the relief withheld. The court, in such a case, is without jurisdiction to render any other or further judgment or relief in the action: *White v. White*, 130 Cal. 597, 599.

The refusal of the court where the decree was rendered to set aside the deficiency judgment cannot operate as an estoppel to preclude relief in equity against the judgment; and where there was no evidence to show that the decision of the motion involved the same questions as are involved in the action, the court was justified in finding the contrary: *Herd v. Tuohy*, 133 Cal. 55, 63.

#### **Judgments in Personam.**

A right of way by necessity is extinguished by a judgment of partition by which an actual adjacent way is made appurtenant to the land: *Casey v. Rae*, 58 Cal. 159, 163.

Where one sustains damage through the act of a tenant of another, a judgment in favor of the first party against the landlord is not conclusive in an action by the landlord against the tenant for damages arising out of the same transaction: *Ferrea v. Chabot*, 63 Cal. 564, 567.

A sale under a judgment for the foreclosure of a lien would not create a cloud upon the title or in any manner affect the rights of one owning the fee and in the actual possession of the land, but not a party to the judgment; and a court of equity will not enjoin the sale at his instance: *Archbishop of San Francisco v. Shipman*, 69 Cal. 586, 588.

An action of ejectment by a cestui que trust against the trustee to recover possession of the trust estate is not a bar to a subsequent action against him to establish the trust: *O'Connor v. Irvine*, 74 Cal. 435, 441.

In an action of ejectment, in which the defendant claims title to the demanded premises under an execution sale of the land, made in pursuance of a judgment against the plaintiff, the judgment-roll in an

action brought by the plaintiff against the execution purchaser, to set aside the judgment and execution sale on the ground that the same were void, in which action judgment had been rendered in favor of the execution purchaser on a demurrer to the complaint, is admissible in evidence: *Peterson v. Weissbein*, 75 Cal. 174, 177.

A judgment dismissing an action because of the failure of the plaintiff, who was a nonresident of the state, to give security for costs, is not upon the merits, and only concludes the matter then directly adjudged, and is not a bar to a subsequent action, founded upon the same cause of action, by the same plaintiff, after becoming a resident of the state: *Rosenthal v. McMann*, 93 Cal. 505, 509.

The question whether the grantee of the trustee is a purchaser in good faith and for a valuable consideration without notice of the trust is not precluded by the judgment in the action enforcing the trust against his grantor, to which the grantee was no party, it appearing that his title antedates the action. The judgment is conclusive only between the parties and their successors in interest by title subsequent to the commencement of the action: *Warnock v. Harlow*, 96 Cal. 298, 307.

The action was brought by the assignee of an insolvent debtor to recover as damages the value of certain property belonging to the estate of the insolvent which had been converted by the defendant. Prior to the commencement of the action a portion of the property was taken possession of by the sheriff under a writ of attachment against the insolvent. The defendant herein thereupon brought an action in claim and delivery against the sheriff to recover as his own the goods so attached. In this action the assignee intervened, claiming the property to belong to the estate of the insolvent, and judgment for its possession was rendered in his favor. The plaintiff in the action of claim and delivery thereupon moved for a new trial, and such motion was undetermined at the time of the commencement of the present action. *Held*, that the prior action of claim and

delivery could not be pleaded in abatement of the present action, except to the extent of the property involved in such prior action: *Hall v. Susskind*, 109 Cal. 203, 205.

The dismissal of a suit in equity brought by the city of Lakland to set aside the grant of the waterfront assumed to have been made by the town as being fraudulent and void, which was dismissed in obedience to a mandate of the supreme court, whose decision left the question of title in the grantee undetermined, and adjudged that there was no ground in equity for the relief asked for, and that, if the grant was void, the city could disregard it, and assert its rights in any appropriate manner, is not *res adjudicata* upon the question of title, and does not estop the city to assert the void character of the grant in a subsequent action: *Oakland v. Oakland Waterfront Co.*, 118 Cal. 160, 220.

Where a decree recites due service of notice by publication or by posting, such recital is sufficient to prove such service, as against a collateral attack: *Crew v. Pratt*, 119 Cal. 139, 147.

A former judgment between the parties is only conclusive when the same thing under the same title is litigated. A former judgment against the plaintiff in an action which he was not entitled to maintain as a *cestui que trust* to quiet his title against the defendant who was his trustee of the legal title, cannot estop him from maintaining a subsequent action which he is entitled to maintain to enforce a resulting trust in his favor against the same defendant: *San Bernardino Co. v. San Bernardino Nat. Bank*, 127 Cal. 245, 248.

If the complaint in foreclosure sets forth the facts upon which an adverse claimant made defendant bases his claim of title, and he allows issues to be tried thereon without objection, he is concluded by the judgment; but if it merely avers that he claims an interest, and that such interest is subsequent and subordinate to the mortgage, it negatives any claim of plaintiff that it was prior thereto and presents a

mere conclusion of law, and the denial of these averments does not raise an issue upon a claim of title prior and adverse to that covered by the mortgage, or upon the validity thereof, and a claim of such title is not concluded by the judgment: *Beronio v. Ventura Co. Lumber Co.*, 129 Cal. 232, 236.

An injunction restraining a bank, which is part of the final judgment rendered in a suit brought under the Bank Commissioners' Act, adjudging the bank insolvent, and otherwise adjudging as provided in the act, is final, in the strictest sense of the term; and, after the expiration of the time for appeal from the judgment, without any appeal therefrom, the court has no power to modify the injunction: *People v. Bank of Mendocino County*, 133 Cal. 107, 108.

Where the fraud committed by the grantee was in the obtaining of a deed of the interest of the grantor in the estate of a deceased person, the decree of distribution of the estate to the fraudulent grantee, as successor of the defrauded party, is not conclusive of the equities between the parties, or of the constructive trust raised by the fraud, where such matter was not actually litigated in the matter of the estate; and, it seems, it was not a proper subject of consideration therein: *More v. More*, 133 Cal. 489, 496.

In an action upon a stay bond, given upon appeal in an ejectment suit to several obligees, one of whom had died, the distribution of the estate of the deceased obligee to plaintiffs cannot be collaterally attacked by the obligors, made defendants in the action: *Todhunter v. Klemmer*, 134 Cal. 60, 62.

A former judgment in an action to quiet title, brought by the vendor against the purchaser after the vendor had retaken possession, in which the purchaser pleaded the contract of sale, and alleged performance thereof to the date of ouster, and filed a cross-complaint, praying judgment for a return of the purchase money paid, but did not allege a rescission of the contract of sale, is not *res adjudicata*, in bar of a subsequent action to recover the purchase money paid, in which a rescission of the contract of sale is

alleged and admitted: *Heilig v. Parlin*, 134 Cal. 99, 101.

A judgment in ejectment, in favor of a tenant, is not conclusive as an estoppel in favor of the landlord, against the plaintiff in ejectment, unless the landlord appeared openly in the case, and was permitted by the court to undertake the defense to the action, so as to have control of the case as a party thereto; and the fact that the tenant was represented by an attorney employed by the landlord is not sufficient to establish the estoppel: *Loftis v. Marshall*, 134 Cal. 394, 396.

In order to sustain a plea in abatement of another action pending for the same cause of action, the identity of the matter involved must be such that a judgment in the prior action could be pleaded in bar as a former adjudication: *McCormick v. Gross*, 135 Cal. 302, 305.

In an action on a judgment rendered in a justice's court of another state, the judgment is conclusive against all defenses which might have been urged in the justice's court; and a defense cannot be allowed that the notes sued upon in the justice's court had been paid before the judgment was rendered: *Banister v. Campbell*, 138 Cal. 455, 459.

### § 1909. Other Judicial Orders.

Other judicial orders of a court or judge of this state, or the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

#### *Cross-references:*

Disputable presumptions defined, section 1963; presumption how controverted, section 1961; presumption



that judicial record correctly determines the rights of the parties, section 1963, subdivision 17; presumption that all matters within an issue were passed upon, section 1963, subdivision 18; judicial order binding upon whom, section 1910; judgment binding upon whom, section 1908; proceedings against one person cannot affect another, section 1848; party when bound by proceeding against surety, section 1912; judicial record of sister state, section 1913; judicial record of foreign country, sections 1914, 1915; order must be pleaded, section 1962, subdivision 6.

### § 1910. When Parties Deemed the Same.

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

#### *Cross-references:*

Presumption created by recitals, section 1962, subdivision 2; parties and their successors are bound by a judgment when, section 1908, subdivision 2; when bound by their judicial orders, section 1909; when bound by foreign judgment, section 1915; presumption that judicial record correctly terminates the rights of the parties, section 1963, subdivision 17; parties to proceedings to perpetuate testimony, section 2084.

See Jones on Evidence, section 602.—As to what persons judgments are conclusive between.

#### **Rule Applies to Depositions.**

A deposition which is taken in an action is admissible in an action between the successors in interest upon the same subject and involving the same issues: *Briggs v. Briggs*, 80 Cal. 253, 254.

**Parties must be Opposing Parties.**

The present appellant, and the executors who are respondents here, were not on opposite sides in the former proceeding, but were in that proceeding on the same side, and therefore the appellant cannot here invoke the principle of estoppel: *Estate of Heydenfeldt*, 127 Cal. 456, 459.

**§ 1911. What Becomes Res Adjudicata.**

That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

*Cross-references:*

Presumption that judicial record correctly terminates the rights of the parties, section 1963, subdivision 17; presumption that all matters within an issue were laid before the jury and passed upon by them, section 1963, subdivision 18; judgment, when conclusive, section 1908; judicial order creates a disputable presumption, section 1909; effect of foreign judgment, sections 1914, 1915; proceedings against one cannot affect another, section 1848; judgment or order, one must be pleaded, section 1962, subdivision 6.

See *Jones on Evidence*, section 614 — Conclusive only as to matters in issue.

**Identity of Questions Must Appear.**

In order that a judgment may estop the parties thereto in a subsequent action, it must appear with certainty to every intent that the identical questions involved were determined in the former action: *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958.

**Judgment Conclusive only as to Facts in Issue.**

If a complainant in foreclosure sets forth facts upon which an adverse claimant made defendant bases

his claim of title, and without objection allows issues to be tried thereon, he is concluded by the judgment; but if he merely avers that he has an interest and that the same is subordinate to the mortgage, a claim of such title is not concluded by the judgment: *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958.

A judgment only concludes the parties as to facts in issue, as distinguished from facts in controversy, and is not conclusive of any matter which only comes collaterally in issue, nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment; nor of any collateral facts which are offered in evidence to establish matters or facts in issue: *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, 562.

Where the petitioner has made a prior application, under section 1354 of the Code of Civil Procedure, to revoke letters issued during his minority, he having been named as executor, which application had been simply denied, without any reason assigned, and without any finding of fact, such denial does not imply a finding of incompetency, and does not constitute a prior adjudication of a want of understanding as against a subsequent application under section 1383 of the Code of Civil Procedure: *In re Li Po Tai*, 108 Cal. 484, 489.

#### **Certainty is Essential Element.**

The application of the doctrine of *res adjudicata* cannot be made by inference or surmise upon the effect of the judgment: *Richardson v. City of Eureka*, 110 Cal. 441, 445.

Certainty is an essential element of every estoppel, and, in the case of a judgment, unless this certainty appear upon the face of the record, the record of the judgment will not constitute an estoppel: *Oakland v. Oakland Waterfront Co.*, 118 Cal. 160, 221.

#### **What Deemed Adjudged.**

“That only is deemed to have been adjudged in a former judgment which appears upon its face to have

been so adjudged, or which was actually and necessarily included therein, or necessary thereto." Equitable rights are not necessarily included in an action of ejectment, and their determination, when not pleaded, is not necessary to a determination of the issues in such action: *O'Connor v. Irvine*, 74 Cal. 435, 441.

It is contended that no issue having been raised as to the trust, its validity was not determined, but the code requires a distribution whether an issue is raised on it or not, so the point was decided of necessity: *Goldtree v. Allison*, 119 Cal. 344, 345.

A former judgment, rendered upon demurrer to a complaint, on the ground that the action appeared upon the face of the complaint to have been barred by the statute of limitations, is not a bar to a new action based upon an additional promise, preventing the bar of the statute: *Newhall v. Hatch*, 134 Cal. 269, 272.

While a general verdict or judgment operates as an estoppel as to such matters as were necessarily considered and determined, it is never conclusive upon immaterial or collateral issues. The beneficiary cannot be compelled to accept a money judgment awarded against the trustee, and is not estopped thereby to recover property wrongfully disposed of by the trustee: *Chapman v. Hughes*, 134 Cal. 641, 654.

In an action of replevin, the gist of the action is the right of the plaintiff to the immediate and exclusive possession of the specific property sued for, at the time of the commencement of the action. A prior action pending, by the same plaintiff against the same defendant, to recover money due under a contract for the price of the same property, is upon a distinct cause of action, and a plea thereof in abatement of the replevin suit which shows that judgment was rendered in the former suit for the defendant does not show a judgment which could be pleaded in bar in the replevin suit, and is not tenable as such plea: *McCormick v. Gross*, 135 Cal. 802, 805.

Where the allowance made to the receiver, after the dismissal of the suit brought by the bank, did not fix the liability of the bank, nor make any order for its payment, the mere fact that the bank, upon notice of the application for the allowance, made answer thereto, setting up the agreement that the receiver was to look alone to the funds received by him for his compensation, which plea was not passed upon, and was not material to the allowance, cannot render such plea *res adjudicata*, or preclude the pleading and proving of the agreement as a defense to the action of the receiver against the bank: *Ephraim v. Pacific Bank*, 136 Cal. 646, 651.

### § 1912. Judgments Against Sureties.

Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defense.

#### *Cross-references:*

Who bound by judgment, section 1908; who bound by other judicial orders, section 1909; who bound by judgment of sister state, section 1913; who bound by foreign judgment, sections 1914, 1915; see cross-references under those sections.

See *Jones on Evidence*, section 608—Judgments against principals in actions against their sureties.

#### **Section is Declaratory of Common-law Rule.**

This section of the code is merely declaratory of the common-law rule: *Ferrea v. Chabot*, 63 Cal. 564, 567.

### § 1913. Effect of Judicial Record of Sister State.

The effect of a judicial record of a sister state

is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

*Cross-references:*

See cross-references under sections 1908, 1909; jurisdiction to sustain a record, section 1917; sister state defined, section 1924.

See Jones on Evidence, sections 634, 635.

Judgments of sister states—Want of jurisdiction may be shown, section 634.

Same—Regularity presumed—Proof of fraud, section 635.

**Actions on Foreign Judgments.**

In an action on a judgment rendered in another state, error in the manner of entering the judgment will not be reviewed. A foreign executrix may maintain an action in this state in her individual name on a judgment recovered by her as executrix in another state on a debt due to her testator: *Lewis v. Adams*, 70 Cal. 403, 407.

In an action on a judgment rendered in a justice's court of another state, the judgment is conclusive against all defenses which might have been urged in the justice's court; and a defense cannot be allowed that the notes sued upon in the justice's court had been paid before the judgment was rendered: *Banister v. Campbell*, 138 Cal. 455, 459.

**§ 1914. Judicial Records of Foreign Courts of Admiralty.**

The effect of the judicial record of a court of

admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

*Cross-references:*

Court takes judicial notice of seals of court of admiralty, section 1875, subdivision 7.

See Jones on Evidence, section 623.—Judgments in rem as evidence.

**§ 1915. Effect of Foreign Judgments.**

The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing;

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

*Cross-references:*

When parties deemed the same, section 1910; when deemed adjudicated, section 1911; judicial record, how impeached, section 1916; presumptions as to judicial record, section 1963, subdivisions 17 and 18; impeachment of written instruments for fraud, section 1856, subdivision 2.

See Jones on Evidence, sections 631-633.

Merits of foreign judgments—Not open to inquiry, section 631.

Same—Conflicting views, section 632.

Foreign judgments—May be impeached for fraud or want of jurisdiction, section 633.

### § 1916. Impeaching Judicial Records.

Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

#### *Cross-references:*

Impeachment of foreign judgment for fraud, section 1915, subdivision 2, and see cross-references under sections 1909 and 1910.

See Jones on Evidence, sections 633-636.

Foreign judgments—May be impeached for fraud or want of jurisdiction, section 633.

Judgments of sister states—Want of Jurisdiction may be shown, section 634.

Same—Regularity presumed—Proof of fraud, section 635.

Domestic judgments not impeachable by parties for fraud, section 636.

#### **Alteration in Record.**

It is the duty of either party to bring to the attention of the court any alteration of the record of a pending proceeding promptly: *People v. Granice*, 50 Cal. 448.

#### **Judgments by Consent.**

A judgment by consent in an action in which the court has jurisdiction of the subject matter of the parties will bind them and their privies as efficaciously as if it had been entered after a trial of the issues: *Partridge v. Shepard*, 71 Cal. 470, 475.



**Section 1916, How Construed.**

Section 1916 of the Code of Civil Procedure simply means that evidence is admissible to impeach the judgment in the cases allowed by law; and does not change the general rule that a defendant cannot collaterally assail a judgment for want of jurisdiction, unless it be void on its face. But this rule is not that a judgment which is void will be enforced as if valid; but that it cannot be shown to be void except in certain cases. If admitted to be void, or shown to be void without objection, it must be treated as void: *Hill v. City Cab etc. Co.*, 79 Cal. 188, 191.

**Impeaching Judgments.**

Where a nonresident has not been personally served with summons within the state, and a default judgment has been entered in the action, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the service of summons and vacate the default and judgment upon motion; and it is not necessary to bring an independent action to set aside the judgment. Any fact going to show the invalidity of the judgment can be presented at the hearing of the motion: *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 396.

**§ 1917. Jurisdiction Sufficient to Sustain a Record.**

The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.

*Cross-references:*

Presumption that a court is acting in lawful exercise of jurisdiction, section 1963, subdivision 16; proceedings in rem, section 1908, subdivision 1, section 1915, subdivision 1; proceedings in personam, section 1908, subdivision 2, section 1915, subdivision 2.

country, and that the copy is duly certified by the officer having the legal custody of the original;

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof. [Amendment approved March 24, 1874; Amendments 1873-74, p. 383. In effect July 1, 1874.]

*Cross-references:*

Public writings classified, section 1984; form of certificate, section 1923; entries in official books are prima facie evidence, section 1920; original record need not be produced, section 1855, subdivision 3.

Subdivision 1. Courts take judicial knowledge of public and private official acts of executive department of this state and the United States, section 1875.

Subdivision 2. Statutes defined, section 1898; statutes may be proven by certified copy, section 1901; courts take judicial notice of statutes, section 1875, subdivisions 1, 2.

Subdivision 3. Sister states includes United states and territories, section 1924.

Subdivision 4. Foreign statutes may be proven by certified copy, section 1901; by books printed under authority of foreign state, section 1900, and see cross-references under those sections.

Subdivision 6. Entries in public books by public officers are prima facie evidence.

See Jones on Evidence.

Subdivision 1.

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**Proof of records of public departments—Copies—Certificates, section 553.**

**Same—Effect of these statutes, section 554.**

**Same—Certificates, section 555.**

**Mere certificates not evidence, section 556.**

**Exceptions to the rule that mere certificates are not evidence, section 557.**

Subdivision 9, sections 552, 553.

**Nonjudicial records—Proof of federal statutes—Department records—Federal statutes, section 552.**

**Proof of records of public departments—Copies—Certificates, section 553.**

### **Documents in Departments of the United States Government.**

It was held that a certificate issued by a register of the United States land office, which was unauthorized by statute or by regulation of the land de-

partment of the United States, is inadmissible: *Hastings v. Delvin*, 40 Cal. 358.

A duly certified copy of a Mexican grant, from the United States surveyor-general's office, is admissible in evidence against the objection that the absence of the original is not accounted for. But it is admissible only when the original itself would be. A certificate of the United States surveyor-general that a paper is a true and accurate copy of a document on file in his office is sufficient, against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant: *Natoma Co. v. Clarkin*, 14 Cal. 545; *Soto v. Kroder*, 19 Cal. 96.

A copy of a decree of confirmation by the United States board of land commissioners, certified by the surveyor general to be a correct copy thereof, "as the same is on file," etc., is admissible: *Young v. Emerson*, 18 Cal. 418.

#### **Preliminary Proof of Execution—United States Patent as Evidence.**

Patent issued by government is admissible in evidence, without any proof of its execution. The official seal sufficiently authenticates it: *Gallup v. Armstrong*, 22 Cal. 480.

A United States patent for land may be proved by producing from the recorder's office the book in which it is recorded without proof of the loss of the original: *Vance v. Kohlberg*, 50 Cal. 346.

Under this section and section 1951, it is not necessary to prove the loss of an original patent before an exemplified copy thereof can be produced in evidence: *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647.

See Presumptions of Regularity of Official Acts, post.

#### **Legislative Journals.**

The legislative journals of this state, or copies of them, properly certified, will be admitted in evidence in any court of justice in this state: *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 495.

**Municipal Ordinances.**

In an action to recover a liquor license imposed by a county ordinance, the passage of the ordinance is proved *prima facie* by producing in evidence the ordinance-book from the custody of the clerk, containing the record of the ordinance, showing that it was passed at a regular session of the board of supervisors, by a specified vote, and that the record is properly authenticated by the signatures of the chairman and clerk, together with evidence showing its due publication; and though the regularity of the proceedings for the adoption of the ordinance is denied by the answer, the burden of contradicting the record by showing that it was not passed as stated in the record is upon the defendant: *Merced County v. Fleming*, 111 Cal. 46, 49.

**Swamp Land District Records.**

A copy of the petition for the formation of a swamp land district, certified by the clerk of the board of supervisors, and a copy of the by-laws, certified by the county recorder, are admissible in evidence: *People v. Hagar*, 52 Cal. 171, 187.

**Certificates of Incorporation.**

The Secretary of State has no authority to issue a certificate of incorporation without first receiving a copy of the articles of incorporation certified by the county clerk, showing that the steps prerequisite to the assumption of corporate powers have been complied with. The certificate of incorporation referred to in section 296 of the Civil Code, required to be issued by the Secretary of State, is requisite to give the incorporation a *de jure* existence. A second certificate signed by him, merely reciting the articles of incorporation were filed in his office on a certain date, on which a certificate of incorporation thereof was issued by him, is not admissible proof of the first certificate, and fails to prove a compliance with the law: *Wall v. Mines*, 130 Cal. 27, 39.

**Official Maps.**

That portion of the official map of the military reservation which includes the lands in controversy and the boundaries of the reservation is admissible for the purpose of showing that such lands are included within the boundaries, nor is it necessary to introduce the whole map in evidence; and the map is sufficiently authenticated by the certificate of the legal custodian thereof, reciting the facts showing that he is such custodian, and his certificate is prima facie evidence of his official character and right to the custody of the map, and of his authority to make such certificate: *Galvin v. Palmer*, 113 Cal. 46, 54.

**§ 1919. Public Records of Private Writings.**

A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

*Cross-references:*

Where an original document has been recorded, it need not be produced, section 1855, subdivision 4; public record of a private writing is a public writing, section 1894; form of certificate, section 1923.

See *Jones on Evidence*, sections 531-537.

Recording acts—Conveyances—Documents recorded when admissible, section 531.

Same—Requisites—Certificates of acknowledgment—Defects in, section 532.

Defective records—Evidence for some purposes, section 533.

Public documents—Provable by copies—Corporate records, section 534.

Copies of records—Different classes, section 535.

Examined and certified copies as evidence, section 536.

Effect of copies as evidence—Cannot exclude originals—By whom certified, section 537.

**Certified Copies of Recorded Writings.**

Certified copies from the office of the Secretary of State, of the articles consolidating two or more railroads are, and so are the original articles, admissible to prove the consolidation: *Vance v. Kohlberg*, 50 Cal. 346.

A certified copy of the record of a power of attorney which is entitled to record is admissible in evidence: *Jones v. Marks*, 47 Cal. 242.

And it will not render the copy inadmissible that the power which purported to be executed by four persons was executed by but one: *Spect v. Gregg*, 51 Cal. 198.

A certified copy of a deed from the county recorder's office is *prima facie* evidence: *Canfield v. Thompson*, 49 Cal. 212; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889.

And this without proof of the execution of the original: *Mayo v. Mazeaux*, 38 Cal. 442; *Garwood v. Hastings*, 38 Cal. 216.

Though it must be shown, unless waived, that the original is not under the control of the party producing the certified copy: *Mayo v. Mazeaux*, 38 Cal. 442; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103; *Hurlbutt v. Butenop*, 27 Cal. 50.

A copy of the petition for the formation of a swamp land district, certified by the clerk of the board of supervisors, and a copy of the by-laws, certified by the county recorder are admissible in evidence: *People v. Hagar*, 52 Cal. 171, 186.

The books of the recorder's office are not admissible in evidence to prove the execution and contents of deeds which have been duly recorded, unless the absence of the originals is first explained or accounted for: *Brown v. Griffith*, 70 Cal. 14, 16; *Grant v. Oliver*, 91 Cal. 158, 164. Overruling *Gethin v. Walker*, 59 Cal. 502.

Conceding that the record of a deed which is introduced in evidence without objection is *prima facie* evidence of the genuineness, due execution, and delivery of the original, still it is only *prima facie*

evidence of those facts, and may be rebutted: *Burroughs v. De Couts*, 70 Cal. 361, 367.

“It was not necessary that the plaintiff should have received and accepted the patent, in order to vest in him title to the land granted. It is settled law that title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title. It was not necessary, therefore, that the plaintiff prove the loss of the original patent, before he could introduce the copy in evidence”: *Eltzroth v. Ryan*, 89 Cal. 135, 139; *Vance v. Kohlberg*, 50 Cal. 346, 348.

### § 1920. Entries in Official Records.

Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein. [Amendment approved March 24, 1874; Amendments 1873-74, p. 384. In effect July 1, 1874.]

#### *Cross-references:*

Official documents may be proven by certified copies, section 1918; entries made by an officer or board of officers or under their direction when prima facie evidence, section 1920; original records in custody of public officer may be proven by certified copy, section 1855, subdivision 3.

See *Jones on Evidence*, sections 520, 521.

Official registers—Books of public officers, section 520. Proofs of facts contained in official registers, section 521.

#### **Official Entries in General.**

Wherever acts of public officers are authenticated by their records, the records are evidence of the acts: *Gregory v. McPherson*, 13 Cal. 562.



The articles which are filed in the office of the Secretary of State consolidating two or more railroad companies, are admissible in evidence to prove such consolidations: *Vance v. Kohlberg*, 50 Cal. 346.

Conceding that the assessment-roll of a swamp-land district, when properly certified by the commissioners, becomes an official record within the meaning of sections 1920 and 1926 of the Code of Civil Procedure, and evidence of all the facts recited in it, still it is only prima facie evidence, and may be contradicted by showing that the assessments were arbitrarily made without reference to the proportionate benefits to be derived to each piece of land assessed by reason of the proposed work: *Swamp Land District v. Gwynn*, 70 Cal. 566, 570.

A transcript of the shorthand reporter's notes in a criminal case, certified as provided in section 869 of the Penal Code, is placed upon the same footing as a deposition, and is admissible in like cases. The requirement as to the time of filing is merely directory. Filing in a reasonable time is sufficient: *People v. Grundell*, 75 Cal. 301, 303.

In an action to enforce the payment of a swamp-land assessment, the record as entered in the minute-book of the board of supervisors of the order of the board appointing commissioners to view the land and make the assessment is prima facie evidence of the facts stated therein, and where the record as originally entered is shown to have contained a clerical error, it may be altered so as to conform to the order as actually passed by the board, and as so altered is admissible in evidence: *Reclamation District v. Wilcox*, 75 Cal. 443, 448.

In an action against the sureties upon an official bond, to recover money received by the officer in his official capacity, which he neglected to pay to the state, as his official duty required, where the plaintiff introduced account-books required to be kept by the secretary of the board, of which the officer was a member, for the purpose of showing that he had not paid the money as required, because the books

did not contain any account of such payment, which they should have contained if such payment had been made, the defendants may show that the books were incorrectly kept, and that there were many other omissions therein which were false and fraudulent, for the purpose of discrediting the books as evidence: *People v. Fairfield*, 90 Cal. 186, 187.

Public records of private writings are not admissible in evidence under section 1920 of the Code of Civil Procedure: *Grant v. Oliver*, 91 Cal. 158, 164.

The record of an ordinance, accompanied with proof of proper publication, is sufficient to entitle it to be admitted in evidence, and is *prima facie* proof that the ordinance was passed, signed, and attested in the form in which it appears in the record, and casts the burden on the defendant of rebutting the presumption arising from the record: *County of San Diego v. Seifert*, 97 Cal. 594, 597; *Merced Co. v. Fleming*, 111 Cal. 46, 49.

#### **Duty Specially Enjoined by Law.**

It was held that a plat of a survey made by a county surveyor was not admissible in evidence unless it was made out and certified in a form constituting it evidence as provided in the third, seventh and tenth sections of the act of April, 1850, prescribing the duties of county surveyors; but such survey might be admitted as a private survey, without being thus made out and certified: *Doherty v. Thayer*, 31 Cal. 140.

It was provided by section 9 of the act of 1862, relative to the improvements of streets in San Francisco, that after the contractor had fulfilled his contract, etc., the superintendent should make an assessment to cover the sum due for the work performed and incidental expenses. This was held to be an official act on the part of the superintendent and its character and authenticity could be attested only by official signature of the superintendent: *Dougherty v. Hitchcock*, 35 Cal. 521.

Physician's certificate as to cause of death competent evidence of that fact: *Estate of O'Connor*, 113 Cal. 69, 50 Pac. 4.

**Alcalde's Records.**

Book of accounts kept in office of alcalde is admissible in evidence as a register of the acts of that officer belonging to the office: *Kyburg v. Perkins*, 6 Cal. 674.

**§ 1921. Transcript from Docket of Justice of the Peace.**

A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

***Cross-references:***

Transcript, how certified, section 1922; sister state includes territories, section 1924.

See *Jones on Evidence*, section 643—Proof of records of sister states.

**Justice's Court of Sister States.**

In an action on a judgment rendered in a justice's court of another state, the judgment is conclusive against all defenses which might have been urged in the justice's court; and a defense cannot be allowed that the notes sued upon in the justice's court had been paid before the judgment was rendered: *Banister v. Campbell*, 138 Cal. 455, 462.

**Justice's Docket.**

A certified copy of the entries in a justice's docket is prima facie evidence of the facts stated, and is admissible for plaintiff in an action for malicious prosecution of a criminal proceeding before the justice: *Shatto v. Crocker*, 87 Cal. 629, 25 Pac. 921.

### § 1922. Certificate to Transcript of Justice of the Peace.

There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

#### *Cross-references:*

Admissibility of transcript when properly certified, section 1921; effect of judgment of sister state, section 1913; jurisdiction sufficient to sustain a record, section 1917.

#### **Justice may Prove His Jurisdiction.**

Under section 1922, it was proper to receive the deposition of the justice who rendered the judgment showing the creation and jurisdiction of the justice's court, in conformity with the act of the state providing for its creation: *Banister v. Campbell*, 138 Cal. 455, 462.

**§ 1923. Contents of Certificates.**

Whenever a copy of a writing is certified for the purpose of evidence the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court. [Amendment approved March 24, 1874; Amendments 1873-74, p. 384. In effect July 1, 1874.]

*Cross-references:*

Certificate of transcript from record of justice of the peace of sister state, section 1921; certificate of clerk on affidavit taken out of this state, section 2015; certificate of commission to take deposition out of this state to be used in justice's court, section 2024; seal defined, section 1930; public seal defined, section 1931.

See Jones on Evidence, sections 553-557.

Proof of records of public departments—Copies—Certificates, section 553.

Same—Effect of these statutes, section 554.

Same—Certificates, section 555.

Mere certificates not evidence, section 556.

Exceptions to the rule that mere certificates are not evidence, section 557.

**Form of Certificate.**

That portion of the official map of the military reservation which includes the lands in controversy and the boundaries of the reservation, is admissible for the purpose of showing that such lands are included within the boundaries, nor is it necessary to introduce the whole map in evidence; and the map is

sufficiently authenticated by the certificate of the legal custodian thereof, reciting the facts showing that he is such custodian, and his certificate is prima facie evidence of his official character and right to the custody of the map, and of his authority to make such certificate: *Galvin v. Palmer*, 113 Cal. 46, 54.

**§ 1924. Sister States Includes United States and Territories.**

The provisions of the preceding sections of this article applicable to the public writings of a sister state are equally applicable to the public writings of the United States or a territory of the United States. [Amendment approved March 24, 1874; Amendments 1873-74, p. 385. In effect July 1, 1874.]

**§ 1925. Certificate of Purchase as Evidence.**

A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

*Cross-references:*

Primary evidence defined, section 1829; prima facie evidence defined, section 1823; presumptions as to ownership, section 1963, subdivision 12.

**Certificate is Prima Facie Evidence.**

Whenever the register receives from a county treasurer a statement showing that an applicant for state lands has made the first payment, he must issue to the person entitled thereto a certificate of purchase, showing the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest is to be computed, the amount paid, and the amount remaining unpaid, which certificate is prima facie evidence of title. (Amendment approved March 30, 1874; Amendments 1873-74, p. 52. In effect July 6, 1874.) Pol. Code, 3514.

**Certificate of Purchase.**

A certificate issued by a register of the United States land office, which was unauthorized by statute, or by regulation of the land department of the United States, is inadmissible in evidence in an action involving title to land: *Hastings v. Devlin*, 40 Cal. 358.

A duplicate, dated in 1873, of a certificate of purchase of lieu lands, issued by the register of the state land office in 1861, is not evidence sufficient to show that the state had sold the land in 1861, as against the holder of a United States patent for the same land, dated prior to the time the duplicate certificate was issued: *Laughlin v. McGarvey*, 50 Cal. 169.

A receiver's duplicate receipt is a certificate of purchase within this section: *Figg v. Hensley*, 52 Cal. 244.

A receiver's receipt contains the whole substance of an official certificate of purchase, and ejectment may be maintained on the title and right of possession evidenced by such certificate: *Witcher v. Conklin*, 84 Cal. 499, 24 Pac. 302.

To constitute a certificate of purchase, within the meaning of this section, it is not necessary that it

should contain the word "certify": *Witcher v. Conklin*, 84 Cal. 499, 24 Pac. 302.

The certificates referred to in the section are those which are in force, and not such as have been suspended by competent authority: *Figg v. Hensley*, 52 Cal. 299.

Certificate of purchase is primary evidence that the holder is entitled to the land: *Laugenour v. Hennagin*, 59 Cal. 625.

But if it has issued for land not subject to location, it is void, and not admissible in evidence: *Aurrecochea v. Sinclair*, 60 Cal. 532; *Young v. Shinn*, 48 Cal. 26.

And such evidence may be overcome by proof that, at the time of filing the pre-emption claim on which the certificate issued, the land was in the adverse possession of another: *Haven v. Haws*, 63 Cal. 452.

Absence of any record in local land office showing payment of the purchase money does not overcome the receiver's receipt as evidence of payment. The making of such record is a matter between the officer and the government, and cannot affect the rights of the purchaser under the certificate of the receiver, which is sufficient evidence that the pre-emptor had taken all the necessary steps toward pre-empting the land: *Witcher v. Conklin*, 84 Cal. 499, 24 Pac. 302.

When a pre-emptor of public land of the United States pays for the land, and takes the receiver's receipt, he thereby becomes the equitable owner of the land, and the government cannot thereafter sell it or hold it open to pre-emption by another, and a subsequent settlement and filing upon the land by another gives no title or right whatever: *Witcher v. Conklin*, 84 Cal. 449, 24 Pac. 302.

A pre-emption receipt entitling one to a patent is a "certificate of purchase" under this section: *Graves v. Hebborn*, 125 Cal. 400, 58 Pac. 12.

This section applies to a certificate of sale of mineral land: *McTarnahan v. Pike*, 91 Cal. 540, 27 Pac. 784.

A certificate of purchase of school land issued by the register of the state land office is not conclusive



of the right of purchase as against a subsequent applicant; and the latter, even after the certificate has issued, may institute a contest to determine the right of purchase: *Jacobs v. Walker*, 76 Cal. 175, 18 Pac. 129.

When appellant made his application and obtained his certificate of purchase, the land was not suitable for cultivation and there was no provision of the constitution or statutes at that time that state lands suitable for cultivation could be sold only to actual settlers thereon. The certificate of purchase was prima facie evidence of legal title in the holder; and it must be presumed that the new constitution did not and was not intended to impair the obligation of contracts already made. The validity of the certificate must therefore be determined by the law in force at the time it was issued, and it cannot be affected by laws subsequently passed: *Miller v. Byrd*, 90 Cal. 150, 156.

Section 1925 of the Code of Civil Procedure applies to a certificate of sale of mineral land: *McTarnahan v. Pike*, 91 Cal. 540, 543.

One holding a quarter section of surveyed government land, under a final pre-emption receipt entitling him to a patent therefor, acquires no new or greater right by his patent describing the same land described in the receipt, so far as the boundaries of his land are concerned. His final receipt is prima facie evidence of ownership, and is a "certificate of purchase" under section 1925 of the Code of Civil Procedure: *Graves v. Hebborn*, 125 Cal. 400, 405.

If the plaintiff in ejectment relies, to recover, only on the fact that the Secretary of the Interior awarded him the land as a pre-emptor in a contest with the defendant, and that he paid for the land and obtained the receipt of the receiver of the local land office, and that he had cultivated and improved a part of the land, the defendant may prove that when the plaintiff entered on the land, a large portion of it was, and ever since has been, in the adverse possession of the defendant or his grantors: *Conlan v. Quinby*, 51 Cal. 412, 414.

The plaintiff at the trial put in evidence two swamp-land certificates, the amounts due upon which had been fully paid up. These, the counsel expressly stated, were not introduced to show title, but to show color of title—to define the extent of his possession. These certificates seem to be regular on their face, and we think they constituted color of title. Such a certificate is “evidence that the holder is owner of the tract described therein.” And if the plaintiff entered under it believing in good faith that it conferred on him a right to the land, and pastured his cattle there, he had constructive possession of the tract, even if it was not inclosed: *Goodwin v. McCabe*, 75 Cal. 584, 587.

#### **Land Office Certificates.**

A certificate of the register of the United States land office, to the effect that certain lands described therein had been previously listed to the state by the Secretary of the Interior as lieu lands, is not evidence of that fact: *Murphy v. Sumner*, 74 Cal. 316, 16 Pac. 3.

#### **§ 1926. Official Entries.**

An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry. [Amendment approved March 24, 1874; Amendments 1873-74, p. 385. In effect July 1, 1874.]

#### *Cross-references:*

Official entries are prima facie evidence, section 1920; official entries, how proven, section 1918; such entries are public writings, section 1888.

See *Jones on Evidence*, sections 520, 521.  
Official registers—Books of public officers, section 520.  
Proofs of facts contained in official registers, section 521.

## ARTICLE III.

## PRIVATE WRITINGS.

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## § 1929. Private Writings, How Classified.

Private writings are either—

1. Sealed; or,
2. Unsealed.

### *Cross-references:*

No distinction between sealed and unsealed writings, section 1932; seal defined, section 1930; public seal defined, section 1931; seal of sister state, section 1931; courts take judicial notice of seals of courts, notary publics, and seals of office when, section 1875, subdivisions 4, 5, 7.

See Jones on Evidence, section 440—Sealed and unsealed instruments.

## § 1930. Seal Defined.

A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument.

### *Cross-references:*

Public seal defined, section 1931; private seal defined, section 1931; courts take judicial notice of certain seals, section 1875; no difference between sealed and unsealed writings, section 1932.

## § 1931. Seals, How Made.

A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A

private seal may be made in the same manner by any instrument or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this state. [Amendment approved March 24, 1874; Amendments 1873-74, p. 385. In effect July 1, 1874.]

*Cross-references:*

Seal defined, section 1930; judicial record of sister state must be attested under seal, section 1905; judicial record of foreign country also, sections 1906, 1907, subdivision 3; certificate to certified copy of official document must be under seal, section 1923.

**Corporate Seals.**

A corporation may alter its seal at pleasure, and may adopt as its own the private seal of an individual if it chooses to do so; but when adopted, it must be used as the seal of the corporation. It is unnecessary to state in the document sealed that the seal used is that of the corporation, if the fact otherwise appear, either presumptively from the language of the conveyance, or by evidence aliunde. The fact must appear, however, in some manner: *Richardson v. Scott River etc. Co.*, 22 Cal. 156.

**Seal—Includes What.**

When the seal of a court, public officer, or person is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone as well as upon wax or a wafer affixed thereto: *Code Civ. Proc.*, sec. 14.

**Seal of Court—When Necessary.**

The seal of a court need not be affixed to any proceeding therein or document, except;

1. To a writ;
2. To the certificate of probate of a will or of the appointment of an executor, administrator, or guardian;
3. To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk: Code Civ. Proc., 153.

**What Courts Have Seals.**

Each of the following courts shall have a seal:

1. The supreme court;
2. The superior courts;
3. The police court of every city and county: Code Civ. Proc., 147.

**Seal may be Affixed by Impression.**

A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written: Civ. Code, 1628; *Connolly v. Goodwin*, 5 Cal. 221.

The impression may be made by a pen as well as by a stamp: *Hastings v. Vaughn*, 5 Cal. 315.

**§ 1932. Sealed and Unsealed Instruments.**

There shall be no difference hereafter, in this state, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal. [Amendment approved March 24, 1874; Amendments 1873-74, p. 386. In effect July 1, 1874.]

*Cross-references:*

Private seal defined, section 1931; agreement of composition requires no seal, section 1934; seal is not requisite to execution of instrument, sections 1932, 1933.



See Jones on Evidence, sections 440-448.

The rule does not prevent proof of fraud—Sealed and unsealed instruments, section 440.

Illegality of contract may be shown—Incapacity, section 441.

As to mistakes of fact—Reformation of contract, section 442.

Mistakes as to dates, section 443.

Proof of independent or collateral contracts, section 444.

Parol evidence when the writing is incomplete, section 445.

Sales of personal property, section 446.

Parol proof of subsequent agreement, section 447.

Same—As to specialties, section 448.

#### **No Distinction Between Sealed and Unsealed Instruments.**

All distinctions between sealed and unsealed instruments are abolished: Civ. Code, sec. 1629.

The Mexican system knew nothing of the common-law doctrine of seals. A power of attorney executed while those laws were in force is, therefore, good without a seal: *Posten v. Rassetts*, 5 Cal. 467.

No seal was requisite under the civil law. Any instrument which contained the names of the parties, a designation or description of the premises sold, the date of the transfer, and the price paid, was sufficient to pass the title: *Stanley v. Green*, 12 Cal. 166; *Hayes v. Bona*, 7 Cal. 153.

Though the characters “(L. S.)” were added to a signature, as no words in the body of the instrument were expressive of the intent to make it a sealed instrument, the court held it was not a deed: *McDonald v. Bear River etc. Co.*, 13 Cal. 231.

#### **§ 1933. What is Execution of an Instrument.**

The execution of an instrument is the subscribing and delivering it with or without affixing a seal.

*Cross-references:*

Execution of instrument, how proven, sections 1940, 1941, 1942; certificate of acknowledgment of a private writing is prima facie evidence of execution, section 1948; certificate of acknowledgment of instrument conveying real property is prima facie proof of execution, section 1951.

**Meaning of "Execute."**

The word "execute" when applied to a written instrument, unless the context indicates that it was used in a narrower sense, imports the delivery of the instrument: *Le Mesnager v. Hamilton*, 101 Cal. 533, 539.

But no obligation on the part of defendants to pay the rent was created or arose until the lease was fully executed, and it was not so executed until it was signed and delivered (Code Civ. Proc., sec. 1933): *Stetson v. Briggs*, 114 Cal. 511, 515.

**Map not an "Instrument."**

A map is not an "instrument" which affects the title or possession of real property, within the meaning of the recording act, nor is an instrument which is to be executed by the party who prepares it, or of which an execution can be acknowledged; but it is sufficient if it be deposited in the recorder's office, and a map so deposited is properly referred to as being of "record" therein, and may be received in evidence, even though it be not acknowledged: *Colton etc. Co. v. Swartz*, 99 Cal. 278, 285.

**In Pleading.**

In an action upon a joint and several note, signed by a person designated as president of a corporation defendant, and by the same person designated "personally," where the note was set out in the complaint and the delivery of it was not denied, and there was no denial of the signatures of the person so designated in the note, a mere denial of the execution of the note by the corporation amounts only to a denial of its subscription of the instrument,

which was not alleged, and the answer must be construed as admitting the genuineness of the actual signatures to the note: *McCormick v. Stockton etc. R. R. Co.*, 130 Cal. 100, 103.

### § 1934. Agreements of Compromise.

An agreement in writing without a seal for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

#### *Cross-references:*

Offer of compromise is not an admission, section 2018.

### § 1935. Subscribing Witness Defined.

A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

#### *Cross-references:*

Opinion of subscribing witness as to sanity of signer, section 1870, subdivision 10; subscribing witness may prove writing, section 1940, subdivision 3.

See *Jones on Evidence*, sections 539-541.

Proof of attested documents—Attesting witnesses to be called, section 539.

Same—Application of the rule, section 540.

Exceptions to the general rule—Absence or disability of witnesses, section 541.

### § 1936. Books as Evidence.

Historical works, books of science or art, and published maps or charts, when made by persons

indifferent between the parties are *prima facie* evidence of facts of general notoriety and interest. [Amendment approved March 24, 1874; Amendments 1873-74, p. 386. In effect July 1, 1874.]

*Cross-references:*

Presumptions as to books published by public authority, section 1963, subdivision 35; presumption as to books or reports, section 1963, section 36; witness may be subpoenaed to produce books, section 1985; books purporting to contain written law of sister state or foreign country admissible in evidence, section 1900; books of reports and decisions of sister state and foreign country admissible to prove unwritten law, section 1902; entries in books when admissible, sections 1946, 1947; books admissible to aid judicial knowledge, section 1875 *ad fin.*; journals of legislature admissible to prove proceedings thereof, section 1918, subdivisions 2, 3 and 4; executive acts may be proven by journals, section 1918, subdivision 1, 2, and 4; acts of a municipal corporation may be proven by book published by authority of such corporation, section 1918, subdivision 5; courts take judicial notice of the laws of nature and geographical and historical matters, section 1875, subdivision 8; maps admissible to prove boundaries, section 2077.

See Jones on Evidence, sections 311, 600, 593-596.

Maps relating to subjects of public or general interest, section 311.

Admissibility of facts in histories, section 600.

Scientific, section 593.

Same—Illustrations of the rule, section 594.

Use of scientific books in the examination of experts, section 595.

**Medical Works.**

It is not competent, upon the examination of medical witnesses, either in direct or cross-examination, to read to them extracts from medical works and ask them whether what is so read corresponds with their

own judgment, when it is apparent that the sole object of so doing is to place before the jury the opinion of the author of the books referred to: *Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091.

The reading of extracts from medical works, and asking an expert medical witness if he agrees with the author, is not permissible on cross-examination, where the extracts do not contradict the evidence of the witness and are evidently intended as evidence for the cross-examining party to sustain his theory of the case. Questions as to extracts from such works, on cross-examination, should be strictly limited to the one purpose of testing the competency of the witness as an expert, or the value of his opinions: *Fisher v. Southern Pacific R. R. Co.*, 89 Cal. 399, 26 Pac. 894.

Medical treatises are not admissible in evidence, whether proved to be standard works or not, except to discredit a witness who based his testimony upon them. They cannot be introduced in evidence, in effect, by asking a medical witness to name the circumstances of cases he had read bearing upon the subject of his testimony. If portions of medical books which are excluded have a tendency to discredit a medical witness, they must be incorporated in the bill of exceptions: *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

In an action to recover damages for personal injuries, a medical book, although proved to be of standard authority, is not admissible in evidence to prove the nature and probable effect of the injuries: *Gallagher v. Market Street Ry. Co. of San Francisco*, 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869.

The books to which a medical expert refers cannot be resorted to in order to support his testimony, but they may be used to contradict or discredit him: *Gallagher v. Market Street Ry. Co. of San Francisco*, 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869.

### **Public Surveys.**

A plat of a survey made by a county surveyor is not admissible in evidence unless it is made out and certified to in a form constituting it evidence, as pro-

vided in the third, seventh, and tenth sections of the act of April, 1850, prescribing the duties of county surveyors. Such survey may be admitted as a private survey without being thus made out and certified to: *Doherty v. Thayer*, 31 Cal. 140.

A map made by a county surveyor, with protractions of certain lines made by his deputy is admissible in evidence when both officers swear to the correctness of the protractions: *Gates v. Kieff*, 7 Cal. 124.

Map of the United States survey, approved by the surveyor general of the United States, which designates a particular subdivision of land as high land, is not evidence tending to show that the land was not "swamp and overflowed" as against one claiming under the state: *Keeran v. Griffith*, 31 Cal. 461.

The act of March 26, 1851, which requires the city of San Francisco to deposit in the office of the Secretary of State a map of the water lot property granted to the city by the same act, does not make such map conclusive evidence of the extent of said property, as the boundaries are completely specified in the act, and the question of what was the water line of the city at the date of the act is one of fact: *Cook v. Bonnet*, 4 Cal. 397.

In an action of ejectment by the state for land in San Francisco claimed to be outside of the red line, or water front, held, that the map, purporting to have been made in 1864 by order of the state harbor commissioners, but not shown to have been approved or adopted by them, was not competent evidence in their favor to show the true location of the red line: *People v. Klumpke*, 41 Cal. 263.

In 1856, commissioners were appointed by the common council of San Francisco to select lots for school purposes. The same year they submitted a report and accompanying map, designating twenty-eight lots as having been selected. The map was certified by the commissioners to be authentic and correct, and the lots selected were colored brown. The report and map were approved by the council. Held, that the map, with the accompanying certificate and report, sufficiently identify the lots reserved for school purposes: *Board of Education v. Donahue*, 53 Cal. 190.

**Private Surveys—Field-notes.**

A private survey is no legal evidence of the facts it purports to contain, since, if it were, any man might recover the land of another by including it in his own boundaries: *Rose v. Davis*, 11 Cal. 133.

When a private survey is admitted as a diagram, but not as evidence, the court should clearly explain to the jury the precise purpose and effect of its admission: *Rose v. Davis*, 11 Cal. 133.

The field-notes made by the defendant's surveyor and engineer, who did not testify to their correctness, and the correctness of which was not proved by any competent evidence, were properly excluded: *Scanlan v. San Francisco etc. Ry. Co.*, 128 Cal. 586, 61 Pac. 271.

**Writings in a Jury-room—What Jury may Take.**

There was no error in denying the request made by the attorney of the defendant to let the jury, upon retiring for deliberation, take with them a diagram which had been used in the trial of the cause in the examination of some of the witnesses: *People v. Cochran*, 61 Cal. 548, 552.

**§ 1937. Lost Instruments.**

The original writing must be produced and proved, except as provided in sections 1855 and 1919. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents, in some authentic document, or by the recollection of a witness, as provided in section 1855.

*Cross-references:*

Laying foundation for introduction of secondary evidence of writing, sections 1937, 1855 and 1829;

copy of instrument or oral evidence of its contents is secondary evidence of the instrument and its contents, section 1830; original writing must be produced or accounted for, section 1937, subdivision 1; lost will must be proven or loss shown, section 1969, subdivision 1; written instrument is best evidence of its existence and contents, section 1829; certified copies of public writings when admissible, section 1893; notice to produce original writing, section 1938, 1939; certified copies of public writings when admissible, section 1893; public records of private writings, section 1919; statute of frauds, sections 1973, 1974; secondary evidence of contents of written instrument may be given at trial, section 1870, subdivision 14; preliminary questions of admissibility of evidence are addressed to the court, section 2102.

See Jones on Evidence, sections 211, 216, 228.

Proof of lost instruments, section 211.

Mode of proving loss—Hearsay admissions—Affidavit, section 216.

Proof of contents of lost documents, section 223.

**Lost Instruments—Secondary Evidence of Contents of Instrument Admissible when Possessor of Original is without the Jurisdiction of the State.**

Secondary evidence of contents of deed or grant is admissible where the possession of the original is traced to the possession of a party not in the state: Gordon v. Searing, 8 Cal. 49.

Where letters are proved to have been mailed by one of the defendants to another residing in a foreign jurisdiction, to which replies were received in due course of mail, it must be presumed that the letters mailed were received in the regular course of mail, and a letter beyond the territory of the state is within the meaning of the statute "lost," so as to allow secondary proof of its contents: Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

**Insufficient Secondary Evidence.**

A copy of a recorded declaration as sole trader under the act of 1852 does not prove either the exist-



cnce or contents of the original: *Reading v. Mullen*, 31 Cal. 104.

An instrument purporting to be a copy of the articles of association of a company is not admissible in evidence when there is no proof that the original of such articles ever existed: *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

Where all the records of a former suit have been destroyed by fire, except the judgment-book, parol evidence of the pleadings and issues between the parties is inadmissible, unless the party offering it introduces at the same time a certified copy of the judgment: *Nims v. Johnson*, 7 Cal. 110.

If the defendant in ejectment relies on a deed claimed to have been given to him by the plaintiff, but lost, he must not only prove the existence of the deed, but its contents: *Sais v. Sais*, 49 Cal. 263.

Witness who cannot read or write is incompetent to testify to the contents of a lost instrument: *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643.

#### **Original Writing must be Produced.**

Copy of deed attached to affidavit has no weight as evidence where the party has the original under his control, and refuses to produce it: *Leese v. Clark*, 29 Cal. 665.

Proof of confirmation of a Mexican grant will be struck out where patent has issued and party offering proof refuses to produce the patent: *Chipley v. Fanis*, 45 Cal. 527.

Section 21 of the act of March, 1851, giving to copies of papers from the recorder's office the like effect as evidence, as the originals does not dispense with the production of the originals if they can be obtained, merely fixing the value of the copy as evidence, when it is necessary to be introduced from the loss of the original: *Macy v. Goodwin*, 6 Cal. 580.

In a prosecution for embezzlement, a copy of an agreement set forth in the indictment is not admissible without first accounting for the original: *People v. Hust*, 49 Cal. 653.

**Lost Instruments—Parol Evidence of Contents of Instrument may be Given After Proof of Loss or Destruction.**

After proof of loss of written contract of sale, oral evidence can be offered of its contents: *Patterson v. Keystone Min. Co.*, 30 Cal. 360. Cited 33 Cal. 320; 9 Colo. 313.

Existence and contents of record or other document to show the regularity of legal proceedings may, if the original be lost or destroyed, be shown by secondary evidence, the same as of any other lost instrument: *Matter of Will of Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

Parol evidence of the payment of taxes by the administrator on the property of the estate is admissible after the loss of the tax receipts has been shown:

*Estate of Moore*, 72 Ca. 335, 13 Pac. 880. Cited 83 Cal. 426, 23 Pac. 393.

If a deed is given in lieu of former deed, such former deed is the best evidence of its contents, but, if lost or destroyed, parol evidence of its contents is admissible: *Poorman v. Miller*, 44 Cal. 269.

Where record-book containing judgment has been destroyed by fire secondary evidence is admissible to establish the fact of the existence of such judgment and its contents: *Ames v. Hoy*, 12 Cal. 11. Cited 22 Cal. 64.

It is proper to ask county clerk, if he knew who had been elected to an office in controversy, it having been shown that proper search was made for the certificate of election, and that it had been destroyed: *People v. Clingan*, 5 Cal. 389.

Testimony of county judge, who stated that he saw certificate of election, is admissible to prove its contents, it having been shown that a proper search was made for it, and that it had been destroyed: *People v. Clingan*, 5 Cal. 389.

**Proof of Loss Must First be Made.**

Oral evidence as to the acknowledgment of a deed and as to its character, as having been a quitclaim

deed, is not the best evidence, and cannot be admitted as secondary evidence without proof of the delivery and loss of the deed: *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132.

The admission of parol evidence of the contents of letters, without first laying a foundation by proof of their loss, is error: *Byrne v. Byrne*, 113 Cal. 294, 299.

### **What is Sufficient Proof of Loss.**

In quo warranto where the person who claimed the office held by the defendant testified that his certificate of election was lost or destroyed, and the county clerk swore that there was not in his office, or, so far as he knew, in the county, any record or written evidence of the persons who were elected to the different county offices; this testimony was sufficient to let in secondary evidence of the election and certificate: *People v. Clingan*, 5 Cal. 389.

It is sufficient prima facie to show that the grantee or his representative or assignee did not have the grant, which it is claimed is lost, and that it was not in the place where it was last seen: *Pierce v. Wallace*, 18 Cal. 165.

Where, to prove prior possession of a mining claim, plaintiff relied upon a notice which had been posted on a tree at one end of the claim, which notice was not produced on the trial, but in place thereof plaintiff introduced a witness who stated that he had frequently seen the notice, and that when he last saw it a part of it was torn and the residue so much defaced as to be illegible, held, that this was sufficient to let in secondary proof of the contents of the notice; and that stricter proof of loss ought not to be required in such cases: *Dunning v. Rankin*, 19 Cal. 640.

Even if it were necessary for a patentee to prove the loss of an original patent before introducing the copy in evidence, his testimony that he never received the original, and did not know what had become of it, is sufficient: *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647.

Secondary evidence of the plaintiff that he wrote the words "canceled and paid" on the back of the note, is sufficiently warranted by proof that he put the note and mortgage in his pocket with those words on the note, to be delivered to the defendant or his attorney, and thought he had given them to the attorney, and could not since find them, though he had looked everywhere among his papers. The fact that he did not expressly state that he had locked in his pocket, the question not having been asked him, cannot affect the sufficiency of the foundation laid: *Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473.

It is not to be expected that witnesses can recite its contents, word for word, in the case of lost instruments where no copy has been preserved. It is sufficient if intelligent witnesses who have read the paper understood its object, and can state it with precision: *Posten v. Rassette*, 5 Cal. 467.

After the lapse of sixteen years, a court will be justified, as against a naked trespasser, in not requiring the very strictest proof of the issuing of an execution: *Russell v. Harris*, 38 Cal. 426, 99 Am. Dec. 421.

Positive testimony by the officer having charge of the records that they were not in his office raises the legal presumption that he had searched for them, unless it should be made to appear from his testimony that such was not the case: *People v. Clingan*, 5 Cal. 389, 390.

#### **Necessity for Proof of Search.**

Where, from the evidence, it appeared probable that K.'s deed was left in a store, and K. only searched the store for it about one year after it had been left there, and inquiry was never made of N., who was the sole occupant of the store during said period, as to his knowledge or possession of the deed; and N., although within the reach of the process of the court, was not summoned as a witness, K.'s evidence alone of its loss was insufficient to lay the foundation for the introduction of oral proof of its contents: *King v. Randlett*, 33 Cal. 318.

The proof in this case of the loss of the book of original entries was not sufficient to let in secondary evidence of its contents, because such proof did not show who last had possession of the book, or any bona fide and diligent search for it: *Caulfield v. Sanders*, 17 Cal. 569.

Before parol evidence can be introduced of the contents of a deed which is claimed to be lost, it must be shown that an unsuccessful search has been made for it in the place where it was last known to have been: *Taylor v. Clark*, 49 Cal. 671.

The admission of secondary evidence of a paper alleged to have been lost is only allowable on proof of a bona fide, diligent search, unsuccessfully made for it in the place where it was most likely to be found, and that the party has exhausted in a reasonable degree all the sources of information and means of discovery naturally suggested by the nature of the case and accessible to the party: *Folsom v. Scott*, 6 Cal. 460. Cited 6 Cal. 581; 17 Cal. 573.

Mere evidence of search for paper alleged to have been lost is not sufficient to admit secondary evidence of its contents, for the search may not have been diligent: *Folsom v. Scott*, 6 Cal. 460.

Secondary evidence of the contents of a missing document not in possession of the adverse party cannot be given when the proof shows that there is a person who might probably have it, of whom no inquiry has been made, but the preliminary proof should show that inquiry has been made, without result, of every person who, according to the evidence, would be likely to have the document, or to know of its whereabouts: *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27.

#### **What is Insufficient Proof of Loss.**

Proof of loss is sufficient to authorize secondary evidence of the contents of a deed if resting upon hearsay: *Lawrence v. Fulton*, 19 Cal. 683. Cited 20 Or. 430, 23 Am. St. Rep. 135, 26 Pac. 272.

In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he derails title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and, in the absence of other evidence his affidavit should have been offered: *Fallon v. Dougherty*, 12 Cal. 104.

Evidence that the library and papers of the party were destroyed by fire, except a few papers, accompanied by evidence of search for the particular paper, is insufficient to admit secondary evidence of its contents, for the paper in question may be one of those saved from the fire: *Folsom v. Scott*, 6 Cal. 460.

To entitle one to introduce secondary evidence of an ordinance, the search for the original should have been made and testified to by the keeper of the records, or he should have been subpoenaed to bring into court with him the original ordinance, and then, upon his failure to find it after diligent search, the copy, if established to be correct, would have been admissible: *Norris v. Russell*, 5 Cal. 249.

Evidence that a written instrument had been in the possession of one or the other of two men, and that one of the two had not got it, and had searched for it and could not find it, without the same proof as to the other, does not lay the foundation to admit oral proof of its contents: *Patterson v. Keystone Min. Co.*, 30 Cal. 360.

### § 1938. Notice to Produce.

If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where

the writing is itself a notice or where it has been wrongfully obtained or withheld by the adverse party.

*Cross-references:*

Secondary evidence of the contents of writing admissible when original is in possession of adverse party, and he fails to produce after reasonable notice, section 1855, subdivision 2; when notice to produce given party is not obliged to offer writing in evidence, section 1939; where writing is produced from custody of adverse party, execution need not be proved, section 1942.

See Jones on Evidence, sections 17-19, 218-227, 225. Presumptions from withholding evidence, section 17. Same subject—Qualifications of the rule, section 18. Same—Effect of the presumption on the burden and degree of proof, section 19.

Effect of notice to produce, section 218.

Object of notice to produce—Time of giving, section 219.

Illustrations of sufficient notice, section 220.

Requisites of notice, section 221.

Notice to produce—On whom served, section 222.

Effect of nonproduction, section 223.

When notice to produce is not necessary, section 224.

Same, continued, section 225.

Duplicates—Recorded deeds, section 226.

Effect of the production of papers upon notice, section 227.

**Notice to Produce Writing in Custody of Adverse Party.**

Secondary evidence of contents of written instrument may be given when the party offering it is not entitled to the custody of the original, and the opposite party, to whose custody it rightfully belongs, upon being notified to produce it, disclaims all knowledge of it: Jones v. Jones, 38 Cal. 584.

Parol proof of a written contract and assignment thereof in writing is not admissible, so as to charge the assignee, without notice to produce the original or accounting for its loss: Grimes v. Fall, 15 Cal. 63.

Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so: *Poole v. Gerrard*, 9 Cal. 593.

Where the superintendent of the mill was president and the principal stockholder of a bank, and also a stockholder of the mill company, but was not a party to the action, and the cashier and clerk of the bank refused to exhibit the books of the bank when their depositions were taken, at a time when neither the mill company nor its principal stockholders were parties to the action, and no demand appears to have been made at any time upon any party to the action for a production or inspection of the books of the bank, the parties to the action cannot be treated as spoliators of testimony: *Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal 369, 41 Pac. 308.

Where the books of the deceased were last seen in the possession of the executor, and he failed to produce them upon the order of the court, and it appeared that they could not be found, the objection of the executor as respondent, upon appeal of the plaintiff from a judgment of nonsuit, that error occurring at the trial must be presumed harmless, because nonpayment of the claim during the lifetime of the deceased was not proved, will not be entertained, in the absence of explanation under oath by the defendant as to why the books were not produced in compliance with the order of the court: *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.

Where the pleadings are verified, and the execution of the lease and its contents are not denied, proof of a copy of the lease can add nothing to the admissions of the pleadings, and cannot be prejudicially erroneous. But if the defendant is in possession of the original lease, and after being notified to produce it, has failed to do so, and does not object to the reasonableness of the notice, the copy is admissible, and is not subject to the objection that it is not the best evidence: *Harloe v. Lambie*, 132 Cal. 133, 136.



**Notice to Produce Unnecessary Where Writing is Itself a Notice.**

Parol evidence is admissible to prove contents of notice in possession of other party, and it is not necessary to give notice to the opposite party upon whom it was served to produce it: *Gethin v. Walker*, 59 Cal. 502.

**§ 1939. Writing Called for Need not be Offered.**

Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

*Cross-references:*

Adverse party entitled to reasonable notice to produce writing, section 1938; secondary evidence of document in possession of opponent admissible after notice to produce, section 1938, 1855, subdivision 2. See *Jones on Evidence*, section 227—Effect of the production of papers upon notice.

**§ 1940. Writing, How Proved.**

Any writing may be proved either:

1. By any one who saw the writing executed;  
or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness. [Amendment approved March 24, 1874; Amendments 1873-74, p. 386. In effect July 1, 1874.]

*Cross-references:*

What constitutes execution, section 1933; where private writing is acknowledged the certificate thereof

is prima facie evidence of its execution, section 1948; certificate of acknowledgment of instrument conveying real property is prima facie evidence of execution section 1951; effect of admission of execution where writing is more than thirty years old, section 1942; presumption as to genuineness of ancient writing, section 1963, subdivision 34.

Subdivision 1. Direct evidence of an agreement, section 1831; evidence of precise fact, section 1870, subdivision 1.

Subdivision 2. Genuineness of handwriting may be proven by witness when, section 1943; when opinion admissible respecting handwriting, section 1870, subdivision 9; handwriting proven by comparison, section 1944; comparison of handwriting where writing is more than thirty years old, or has been acted upon as genuine, section 1945; evidence where handwriting is difficult to decipher, section 1863.

Subdivision 3. Subscribing witness defined, section 1935; opinion of subscribing witness as to sanity of signer, section 1877, subdivision 10; where a subscribing witness denies execution, it may still be proven, section 1941.

See Jones on Evidence.

Subdivision 1, section 538.

Proof of execution of documents, section 538.

Subdivision 2, sections 546, 558, 571.

Best evidence after nonproduction of subscribing witnesses, section 546.

Proof of handwriting—Writer need not be called, section 558.

One who has seen another write is competent to testify as to his handwriting, section 559.

Knowledge of handwriting may be gained by correspondence, section 560.

Such knowledge may be gained in the course of business, section 561.

Value of the testimony—How affected by the means of knowledge, section 562.

Use of writing written at the trial for comparison, section 563.

Comparison of handwriting—English rule, section 564.  
Same—Conflicting views in the United States, section 565.

Comparison of simulated signatures—Proof of identity, section 566.

Exceptions—Allowing comparison of hands, section 567.

Writings used for comparison must be shown to be genuine, section 568.

Same, continued, section 569.

Proof of handwriting—Expert evidence, section 570.

What persons are competent as experts as to handwriting, section 571.

Subdivision 3, sections 539, 544, 549.

Proof of attested documents—Attesting witnesses to be called, section 539.

Same—Application of the rule, section 540.

Exceptions to the general rule—Absence or disability of witnesses, section 541.

Diligence necessary, if witness is absent, section 542.

Exception where adverse party claims under the document, section 543.

Exception—Ancient documents, section 544.

### **Execution of Instrument Must be Shown Before It is Entitled to Admission.**

Where grantor named in body of deed signs different name from that recited in the body of the deed, it is not entitled to be admitted in evidence until it has been shown by parol proof that the person who executed the deed was the same one whose name is recited in the body: *Tustin v. Faught*, 23 Cal. 237.

An act of the legislature which empowers the executors of a deceased person to sell and convey lands of the deceased is not sufficient to lay the foundation for introducing in evidence a deed executed by the executors, without proof of the death, and that deceased made a will appointing executors who had entered upon the discharge of their duties: *Kimball v. Semple*, 25 Cal. 440.

It is error to admit letters in evidence without proving that they were written by the party intended to be charged by their contents: *Sinclair v. Wood*, 3 Cal. 98.

**Execution Need not be Proved Where Instrument is Merely Introduced to Identify Premises in Controversy or for Other Collateral Purpose.**

If a deed of land which does not contain a description of the land conveyed, but in the body of it refers to another deed for such description, is properly admitted in evidence, then the deed to which it refers is entitled to be received in evidence, for the purpose of showing a description of the land conveyed, without any proof of its genuineness, or that there was any such person as the one purporting to execute it, or that he had any title to the land described therein: *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103.

Though an instrument be inadmissible as evidence of title, because on its face it is doubtful whether it be the deed of the agent executing it or of the principal, still it may be admissible to show the date of the plaintiff's possession; and if the agent was in the actual occupancy of the land, the paper would be good to show a surrender by him to plaintiff: *McDorald v. B. R. & A. W. & M. Co.*, 13 Cal. 220.

**Proof of Execution, Law—How Waived.**

If the complaint contains a copy of the note sued on, and is not verified, and the answer denies its execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature: *Corcoran v. Doll*, 32 Cal. 82.

The action was brought on a promissory note, which was set forth in *haec verba* in the complaint. The answer was unverified, and consisted of a general denial. Thereby the genuineness and due execution of the note were admitted: *Brown v. Weldon*, 71 Cal. 393, 12 Pac. 280.

**Execution—Effect of Partial Proof.**

A bill of sale of a mining claim executed by three grantors is admissible in evidence if the execution of only two of the grantors is proven. If the execution of the third grantor is not proven, the failure to make this proof should be taken advantage of by asking the court to instruct the jury to disregard it so far as it purports to convey the interest of the person whose signature is not proven: *St. John v. Kidd*, 26 Cal. 263.

**Proof of Indorsement of Notes.**

An indorsee cannot give notes in evidence without proof of their indorsement: *Youngs v. Bell*, 4 Cal. 201.

Proof of the indorsement of a promissory note is necessary to entitle it to admission in evidence, unless waived when the indorsement is offered in evidence: *Poorman v. Mills*, 35 Cal. 118. Cited 93 Cal. 117, 23 Pac. 855.

In an action on a promissory note by a special indorsee against the maker the plaintiff must prove at the trial the genuineness of the indorsement under oath: *Grogan v. Ruckle*, 1 Cal. 158. Cited 4 Cal. 202.

In an action by the indorsee of a promissory note against the maker, when the pleadings are not verified, and the answer consists of a general denial, the due indorsement of the note is thereby put in issue, and the issue is a material one: *Mahe v. Reynolds*, 33 Cal. 560.

Objection to indorsements on notes is waived if no objection is made to the admission of the notes in evidence: *Pinkham v. McFarland*, 5 Cal. 137. Cited 35 Cal. 121.

**Acknowledgment by Father of Illegitimate Child, how Proved.**

Section 1837 of the Civil Code uses the word "acknowledgment" in its ordinary acceptation, and does not prescribe any stated form of acknowledgment, nor require that it should be specially prepared for the sole purpose of making the illegitimate child an

heir of the father, nor that the acknowledgment shall state the fact that the child is illegitimate, nor that the witness in whose presence it is signed must be a subscribing witness. The written acknowledgment may be made in the form of letters from the father, stating the fact of paternity of the child, signed by him in the presence of a competent witness, who need not be a subscribing witness to the acknowledgment: *Blythe v. Ayres*, 96 Cal. 532, 587.

**Where Subscribing Witness is Absent from Jurisdiction.**

A subscribing witness to a written instrument, if within the jurisdiction of the court, must be produced, or some sufficient reason given for his absence: *Stevens v. Irwin*, 12 Cal. 306.

Where a conveyance, not acknowledged, is offered in evidence, and it is proved that it was executed by the grantor and witnessed by subscribing witnesses out of the state, and there is no evidence to show that the subscribing witnesses were ever in the state, a sufficient presumption is raised that the subscribing witnesses are not within the jurisdiction of the court to let in secondary evidence of its execution by the grantor: *Landers v. Bolton*, 27 Cal. 393.

A bill of sale of a mining claim is sufficiently proved when the handwriting of the subscribing witness who is absent from the state, and the execution by the vendor is proven. And this, though the subscribing witness was in the state after suit instituted and near the place of trial, and plaintiff used no efforts to get the testimony of the witness before he left the state: *Jackson v. Feather River Water Co.*, 14 Cal. 18.

Where a subscribing witness to a bill of sale is out of the state, and the proof is that witness saw subscribing witness put his name to it, and saw grantor sign it, and recognizes the paper from hearing it read—not being able to read himself—and another witness testifies that the signature of the sub-

scribing witness is in his handwriting, this is sufficient evidence to identify the paper and authorize it to be read in evidence: *McGarrity v. Byington*, 12 Cal. 426.

A subscribing witness who is called to prove the execution of the instrument, who testifies that it was signed in his presence, "to the best of his recollection," is sufficient to allow it to be read in evidence: *McGarrity v. Byington*, 12 Cal. 426.

When the subscribing witness to a written instrument is beyond the jurisdiction of the court such instrument is admissible in evidence upon proof of the signature of the grantor or obligor, without proving the handwriting of the subscribing witness, unless the instrument is one which the law requires to be attested by witnesses, in which case proof of the handwriting of both parties and subscribing witnesses might be necessary: *Landers v. Bolton*, 26 Cal. 393.

An instrument in writing, executed and attested by a subscribing witness in a foreign country, or at a place beyond the jurisdiction of the court, can be proved by evidence of the handwriting of the party who executed it: *McMinn v. Whelan*, 27 Cal. 300.

Where a deed not properly acknowledged is executed and witnessed by a subscribing witness in a foreign country, proof that it was executed by the grantor is sufficient to entitle it to be received in evidence without producing the attesting witness, or accounting for his absence, or proving his handwriting: *McMinn v. O'Connor*, 27 Cal. 238.

### **Subscribing Witness Must be Produced on Contests of Wills.**

If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit

the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them: Code Civ. Proc., 1315.

### § 1941. Execution May be Proved by Other than Subscribing Witness.

If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

#### *Cross-references:*

Subscribing witness may prove writing, section 1940; and see cross-references thereunder.

See Jones on Evidence, section 549—Absence of witnesses, etc.—Mode of proving execution by subscribing witnesses.

#### **Where Subscribing Witness does not Recollect.**

When called upon as a witness years afterward, the subscribing witness rarely remembers anything about the matter. He recognizes his signature, perhaps, and that is all he knows in regard to it. The proof of his signature raises a presumption, but it is only a presumption that he actually saw or knew of its execution: *Landers v. Bolton*, 26 Cal. 409.

A subscribing witness who has no recollection of the circumstances of the execution of the instrument, but who recognizes his signature, may be asked if, taking into consideration his recognition of the signature, it is his belief that the paper was signed and executed as stated therein: *Estate of Gharky*, 57 Cal. 274.

### § 1942. Admission of Execution by Party.

Where, however, evidence is given that the party against whom the writing is offered has at



any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section 1945, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

*Cross-references:*

Execution how proven, section 1940; effect of certificate of acknowledgment, sections 1948, 1951; notice to produce, sections 1938, 1939; secondary evidence of the contents of a writing admissible after failure to produce upon reasonable notice, section 1835, subdivision 2; presumption arising from acquiescence, section 1963, subdivision 27; presumption is that document more than thirty years old is genuine, etc., section 1963, subdivision 34; where party has by his own act led another to believe a thing true he is estopped to falsify it, section 1962, subdivision 3.

See Jones on Evidence, section 548—Best evidence after nonproduction of subscribing witnesses—Absence of witnesses, etc.

**§ 1943. Handwriting, How Proved.**

The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

*Cross-references:*

Opinion as to handwriting when admissible, section 1870, subdivision 9; proof of handwriting by comparison, section 1944; comparison of handwriting where writing is more than thirty years old or has been acted upon as genuine, section 1945.

See Jones on Evidence, sections 558-571.

Proof of handwriting—Writer need not be called, section 558.

One who has seen another write is competent to testify as to his handwriting, section 559.

Knowledge of handwriting may be gained by correspondence, section 560.

Such knowledge may be gained in the course of business, section 561.

Value of the testimony—How affected by the means of knowledge, section 562.

Use of writing written at the trial for comparison, section 563.

Comparison of handwriting—English rule, section 564.

Same—Conflicting views in the United States, section 565.

Comparison of simulated signatures—Proof of identity, section 566.

Exceptions—Allowing comparison of hands, section 567.

Writings used for comparison must be shown to be genuine, sections 568, 569.

Proof of handwriting—Expert evidence, section 570, What persons are competent as experts as to handwriting, section 571.

### **Proof of Handwriting.**

The use of exemplars by the witness which had not, at that time, been directly proved to be genuine signatures, is not material, if the exemplars were subsequently proved to be genuine by uncontradicted evidence: *Estate of Marchall*, 126 Cal. 95, 58 Pac. 449.

In a case involving the comparison of different writings where the question is one of resemblance or similarity an ordinary individual can arrive at a conclusion quite as correct as that of the opinion of the most skilled expert in handwriting. Jurors have the right to use their eyes as well as their ears in such a case, and may differ in their conclusion from the opinion of an expert witness: *People v. Storke*, 128 Cal. 486, 60 Pac. 1090.

An expert witness upon handwriting may be allowed to testify as to the reasons upon which he bases his opinion, and the court may admit in evidence photographs of handwriting: *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070.

The testimony of a witness in relation to certain receipts purporting to have been signed by the defendant, to the effect that he was familiar with his handwriting, and that he thought it was his handwriting, but that he did not see him sign them, and would not swear that it was his handwriting, is sufficient to permit the receipts to be put in evidence: *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

Where the genuineness of the signature of a person who was a justice of the peace is in controversy, his signatures to his official docket as justice, after being proved to the satisfaction of the trial judge, are admissible in evidence for the purpose of comparison with the handwriting in controversy, without formal proof that the docket is a public record: *Marshall v. Hancock*, 80 Cal. 82, 85.

#### **Who May Prove Handwriting.**

Witness whose only knowledge has been derived from examination of official documents in official custody, purporting to be signed by another, may give his opinion as a witness to the genuineness of such person's signature to a paper offered in evidence: *Sill v. Reese*, 47 Cal. 294.

Evidence of successor of county surveyor who made and recorded survey that an interlineation therein was in the handwriting of his predecessor is admissible and proper where it is shown that the successor, as county surveyor, had charge of the official documents of that office, and had frequently examined numerous documents therein of his predecessor, and which the latter had testified were in his handwriting: *Burdell v. Taylor*, 89 Cal. 613, 26 Pac. 1094.

One who is proved to be familiar with the signature of the deceased is qualified under the law to give an opinion as to the genuineness of a will: *Estate of Marchall*, 126 Cal. 95, 58 Pac. 449.

**Expert must First Qualify.**

The defendant, having testified that his signature to the instrument in controversy was a forgery, was asked on cross-examination with reference to another document which purported to have been signed by him, and had been used in the case for comparison, whether his signature to that was genuine. *Held*, that the question should have been allowed. The qualification of a witness to speak as an expert, if questioned, must first be determined: *Neal v. Neal*, 58 Cal. 287, 289.

**§ 1944. Comparison of Handwriting.**

Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge. [Amendment approved March 24, 1874; Amendments 1873-74, p. 386. In effect July 1, 1874.]

*Cross-references:*

Execution may be proven by genuineness of handwriting, section 1940, subdivision 2; opinion of witness when admissible to prove handwriting, section 1870, subdivision 9; competency of witness to give belief as to genuineness of handwriting, section 1943; admission of genuineness of handwriting in certain cases, section 1942.

See Jones on Evidence, sections 568-569—Writings used for comparison must be shown to be genuine, sections 568, 569.

**Comparison of Handwriting.**

Upon the trial of a defendant charged with a forgery of an order upon a county superintendent of

schools, other orders of the same general character, proved to be in the handwriting of the defendant, are admissible in evidence for the purpose of determining by comparison whether defendant was the forger of the order recited in the information: *People v. Bibby*, 91 Cal. 470, 27 Pac. 781.

An expert witness cannot testify as to the genuineness of a disputed writing upon a comparison of a genuine writing with a press copy of the writing whose genuineness is disputed: *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381.

The defendant, who has testified that his signature to the instrument in controversy was a forgery, may be asked on cross-examination, with reference to another document which purports to have been signed by him, and had been used in the case for comparison, whether his signature to that was genuine: *Neal v. Neal*, 58 Cal. 287.

Where the genuineness of the signature of a person who was a justice of the peace is in controversy, his signatures to his official docket as justice, after being proved to the satisfaction of the trial judge, are admissible in evidence for the purpose of comparison with the handwriting in controversy, without formal proof that the document is a public record: *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61.

It is not competent for one to use, for the purpose of comparing it with the instrument in question, a writing neither admitted nor treated as genuine by the party in whose handwriting it is claimed to be, nor acted upon by him as his own: *Estate of Cartery*, 56 Cal. 470.

Where a paper is introduced in evidence as a basis for a comparison of the handwriting of the defendant, upon a charge of forgery, evidence explaining the circumstances under which the paper was written is improperly received: *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082.

In a case involving the comparison of writings where the question is one of resemblance or similarity the jury should be permitted to pass on the question

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from a personal inspection of the writings, and may differ in their conclusion from the opinion of an expert witness: *People v. Storke*, 128 Cal. 486, 60 Pac. 1090.

A witness cannot testify that the signature to a lost deed was the same as one signed to a purported deed of the alleged grantor, without preliminary proof of the genuineness of the signature to the deed used by way of comparison, and also that the witness is qualified as an expert to give an opinion upon the matter.

It is not error to exclude opinion evidence upon the genuineness of the signature to a lost deed when no sufficient foundation is laid therefor, and the witness does not testify that he knew the signature, or that he had ever seen the grantor write, or had ever seen any writing that he knew to have been his: *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289.

### § 1945. Ancient Writings.

Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

#### *Cross-references:*

Where writing is only mentioned in this section, and party has admitted its execution no other evidence of execution need be given, section 1942; presumption that ancient writing is genuine, section 1963, subdivision 34.

See *Jones on Evidence*, section 567—Exceptions—Allowing comparison of hands.

#### **Mexican Official Documents.**

The genuineness of the signatures to the official documents of officers of Mexico, which are now in the custody of the surveyor general of the United

States will be presumed in a case where the signatures are used for a collateral purpose, such as to enable a witness who has examined such documents to testify as to the genuineness of the signature to a paper offered in evidence from having seen such signature on such documents: *Sill v. Reese*, 47 Cal. 294.

### § 1946. Entries of Decedents.

The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it;
2. When it was made in a professional capacity, and in the ordinary course of professional conduct;
3. When it was made in the performance of a duty specially enjoined by law. [Amendment approved March 24, 1874; Amendments 1873-74, p. 386. In effect July 1, 1874.]

#### *Cross-references:*

Entries of decedent as proof of pedigree, section 1852; entries in family Bible as evidence of pedigree, section 1870, subdivision 13.

Subdivision 1. Declaration of decedent against entries, sections 1853, 1870, subdivision 4.

Subdivision 3. Official entries when admissible, section 1920.

See *Jones on Evidence*, sections 323, 324.

Entries in the course of business by deceased persons, section 323.

See, as to preliminary proof of correctness of account-books: *Webster v. San Pedro Lumber Co.*, 101 Cal. 326, 35 Pac. 871.

An account-book is not admissible in evidence when the preliminary foundation for its admission either as a book of original entries or as part of the *res gestae*, has not been laid: *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811.

In an action by the grantee of a vendor against a purchaser in possession under a contract of sale from the vendor to recover possession of the premises for nonpayment of purchase money it is not admissible for the plaintiff, upon the question of nonpayment, to introduce the books of account of the vendor, without proof of their correctness as books of original entry, for the purpose of showing that certain sums, and none others, had been paid under the contract: *Kerns v. Dean*, 77 Cal. 555, 19 Pac. 817.

#### **Books of Account—When Proper Evidence.**

Books of account showing the condition of accounts between the attachment debtor and the plaintiff are admissible in evidence on behalf of the plaintiff, there being proof that the books were kept under the direction of the debtor and delivered by him to the plaintiff: *Banning v. Marleau*, 121 Cal. 240, 53 Pac. 692.

The books of a corporation containing the accounts of its business transactions, kept under the immediate care and supervision of its manager and for the accurate keeping of which he was liable under his contract of employment, and which were also the accounts of the manager as agent of the corporation, and which were in effect his declarations and statements of the business transactions of the corporation through his bookkeeper, over whom he exercised supervision and control, are admissible against him to show that the books were not correctly kept: *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.

The books of a bank and the vouchers returned with the statements are properly admissible as evidence of the way the accounts stood at the date of



the last balance; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

The plaintiff being indebted to the defendant on a book account, conveyed to the latter the land in controversy in consideration of an agreement by him to give the former credit for a specified amount on his account. At the trial the court, against objection of the plaintiff, permitted the defendant to introduce his account-books in evidence to show that the credit had been properly given. Held, that the books were properly admitted: *Ross v. Brusie*, 70 Cal. 465, 11 Pac. 760.

In an action against factors it is error to reject the books of the defendants offered to prove the account of the sales: *Lubert v. Chauviteau*, 3 Cal. 458, 48 Am. Dec. 415.

Books of account are competent evidence to prove delivery of goods to the party dealing directly when the nature of the subject does not admit of better evidence: *Severance v. Lombardo*, 17 Cal. 57.

Where a partnership is sued for barley sold to one of firm individually, the account-book of the copartnership admitted to be a book containing original entries, and showing that there was no item of barley in the account of the defendants with the plaintiffs, is admissible in evidence, in connection with the testimony of one of the partners that the book showed the true state of accounts between the plaintiffs and the defendants, and that the items therein contained had been entered at the time of the several transactions therein mentioned: *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403.

When it is sought to be proved that a house was constructed by certain person, as one of a chain of events to show that he owned the lot on which it was built, and evidence is given tending to show that a certain firm built the house and furnished the materials, the account-books of such firm are admissible in evidence to show that they charged the labor and materials to the person who, it is claimed, constructed the house, as such entries are one of a series of contemporaneous circumstances to show who owned the house: *Sill v. Reese*, 47 Cal. 294.

Fact that counterclaim of bank was barred by statute of limitations does not render the books of the bank inadmissible as evidence to show the original indebtedness of the plaintiff to the bank: *McLennan v. Bank of California*, 87 Cal. 569, 25 Pac. 760.

Books of account are evidence to show to whom credit was given: *Le Franc v. Hewitt*, 7 Cal. 186.

As to admissibility of partnership books in suit for an accounting between the partners: *Butler v. Beech*, 55 Cal. 28.

Entries in cash-book under direction of manager of a bank are prima facie evidence of balances of cash on hand: *People v. Leonard*, 106 Cal. 302, 39 Pac. 617.

If two persons who are partners enter into a partnership with a third person residing in another place, and the accounts of the new partnership are kept in the books of the old partners, but are kept separately and not mingled with other accounts, and such third person has access to them, and knows that they are so kept, and makes no objection that they are not kept in separate books, the books are admissible in evidence in an action between the partners, for the purpose of proving the state of the partnership accounts: *Clark v. Gridley*, 49 Cal. 105.

Books of partnership are evidence in actions between the partners, where the question is whether the parties were partners, and when kept subject to the inspection of each, must be admitted as correct until the contrary is shown: *Hale v. Brennan*, 23 Cal. 511.

Books of bank showing original entries of transactions between itself and its customers are admissible in evidence for the bank, for the purpose of showing an alleged indebtedness of the plaintiff to the bank, set up by way of counterclaim in an action by the payee of the note to recover the money collected by the bank: *McLennan v. Bank of California*, 87 Cal. 569, 27 Pac. 760.

#### **Account-books are not Admissible, When.**

Where the plaintiff's defense to the setoff of defendant involved the question whether or not profits

had been made by plaintiff's steamboat, a private account-book of the plaintiff kept by himself, and containing only an account of money paid, is not evidence to sustain plaintiff's hypothesis: *Collin v. Card*, 2 Cal. 421.

In an action of claim and delivery of personal property, the books of account of a third person not a party to the suit are inadmissible to prove the ownership of the property: *Watrous v. Cunningham*, 65 Cal. 410, 4 Pac. 408.

In an action by a creditor of a corporation against a stockholder, entries in the books of the corporation are not admissible, on behalf of the plaintiff, to prove indebtedness: *Neilson v. Crawford*, 52 Cal. 248.

A poker-book, kept by the clerk of a cigar store, containing entries of losses by the keeper of the store, to other players at games of poker conducted in the rear rooms of the store is not admissible in evidence as a tradesman's book of original entry: *Frank v. Pennie*, 117 Cal. 254, 49 Pac. 208.

### § 1948. Certificate of Acknowledgment of Private Writings.

Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment of proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing in the same manner as if it were a conveyance of real property. [Amendment approved March 24, 1874; Amendments 1873-74, p. 387. In effect July 1, 1874.]

#### *Cross-references:*

Execution how proven, section 1840 and cross-references thereunder; execution of instruments affecting

real property how proven, section 1951; prima facie evidence in general, section 1833 and cross-references thereunder; last will, how proven, section 1969.

#### **Not Necessary to Prove Execution of Acknowledged Instrument.**

Section 29 of the act concerning conveyances, which authorizes an instrument which has been proved in the manner prescribed in that act to be read in evidence with the certificate without further proof, is not limited to instruments to be thereafter executed: *Clark v. Troy*, 20 Cal. 219.

Thus, where a deed was executed in September, 1847, and in December, 1860, proof of the execution was made by the subscribing witness before a notary, who certified to the same in the form required by the conveyancing act, held, that the certificate entitled the deed to be read in evidence: *Clark v. Troy*, 20 Cal. 219.

#### **Except Wills.**

A will is not a conveyance within provisions of act concerning conveyances, which can be read in evidence upon the certificate of proof, or of acknowledgment by a notary: *Carpentier v. Gardiner*, 29 Cal. 160.

#### **Certificate may be Contradicted.**

The facts recited in a notary's certificate of acknowledgment attached to a receipt and release from liability for a breach of promise of marriage, pursuant to section 1948 of the Code of Civil Procedure, are only prima facie evidence of the execution of the instrument, and are not conclusively presumed to be true. The rule applicable to acknowledgments of conveyances by married women does not apply; and the facts recited in such certificate may be contradicted by any evidence, direct or indirect. An instruction that the evidence of the party named in the certificate, denying the genuineness and due execution of the instrument, is not sufficient to overcome the certificate, should be refused: *Moore v. Hopkins*, 83 Cal. 270, 272.

**Date of Delivery Presumed Same as that of Acknowledgment.**

A deed which was signed, acknowledged and recorded on the day of its date, and produced in evidence by the grantee, carries with it the presumption that it was delivered on that day: *McGorray v. Robinson*, 135 Cal. 312, 314; *McDougall v. McDougall*, 135 Cal. 316, 319.

**§ 1949.**

[Repealed March 24, 1874; Amendments 1873-74, 387. In effect July 1, 1874.]

**§ 1950. Removal of Records.**

The record of a conveyance of real property, or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office. [Amendment approved March 24, 1874; Amendments 1873-74, p. 387. In effect July 1, 1874.]

*Cross-references:*

Right of inspection of public records, section 1892; certified copy of public records must be furnished on payment of fees, section 1893.

**Illegal Removal.**

But illegal removal of a record does not affect its competency as evidence: *People v. Alden*, 113 Cal. 264, 45 Pac. 327.

### § 1951. Acknowledged Instruments Affecting Real Property.

Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof. [Amendment approved March 1, 1889; Amendments, 1889, p. 45. In effect March 1, 1889.]

#### *Cross-references:*

Private writings duly acknowledged may be used in evidence, section 1948; contents of certificate to certified copy, section 1923; prima facie evidence in general, section 1833 and cross-references thereunder.

See Jones on Evidence, sections 535-537.

Copies of records—Different classes, section 535.

Examined and certified copies as evidence, section 536.

Effect of copies as evidence—Cannot exclude originals

—By whom certified, section 537.

#### **Recorded Instruments—Proof of Execution and Loss of Original Unnecessary.**

A certified copy of a deed from the county recorder's office is primary evidence, and is admissible without proof of loss of the original: *Canfield v. Thompson*, 49 Cal. 210.

Copies of the records of deeds, certified by the recorder, are admissible in evidence without accounting for the absence of the originals: *Gethin v. Walker*, 59 Cal. 502.

Certified copies of instruments recorded in book "K" of deeds, in the office of the recorder for the city and county of San Francisco, are admissible in evidence without proof of the execution of the originals: *Garwood v. Hastings*, 38 Cal. 216.

It is well settled that certified copies of instruments, duly recorded, may be read in evidence without proof of the execution of the originals: *Mayo v. Mazeaux*, 38 Cal. 442.

**Former Rule was that Originals Must be Accounted for.**

Under section 1951 of the Code of Civil Procedure, as it existed prior to the amendment of March 1, 1889, the admission in evidence of the record, without proof of the loss of the original or of the inability of the party offering the evidence to produce it, was erroneous: *Grant v. Oliver*, 91 Cal. 158; *Fresno etc. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275; *Brown v. Griffith*, 70 Cal. 14, 11 Pac. 500.

Books of recorder's office are not admissible in evidence to prove the execution and contents of instruments which have been duly recorded, unless the absence of the originals is first explained or accounted for: *Brown v. Griffith*, 70 Cal. 14, 11 Pac. 500.

It must be shown that originals are not under control of party to authorize certified copies of recorded instruments, to be read in evidence, unless the proof of that fact be waived by the adverse party: *Mayo v. Mazeaux*, 38 Cal. 442.

Section 21 of the act of March, 1851, giving to copies of papers from the county recorder's office the like effect as evidence as originals, does not dispense with the production of the originals if they can be obtained; it merely fixes the value of the copy as evidence, when it is necessary to be introduced, from the loss of the original: *Macy v. Goodwin*, 6 Cal. 579.

There is no attempt, by section 21 of the act of March, 1851, to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit: *Macy v. Goodwin*, 6 Cal. 579.

Affidavit by party to suit, that original deed "is not in his possession, or under his control," is sufficient to admit in evidence a certified copy from the recorder's office, the deed having been properly acknowledged and recorded, and the grantee being a third person: *Skinker v. Flohr*, 13 Cal. 638.

#### **Old Rule—Deeds.**

It is error to admit in evidence certified copies of a deed and contract without accounting for the absence of the originals: *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386.

A duly certified copy of a deed regularly recorded is admissible in evidence, under the act of April 29, 1857, if it be shown to the satisfaction of the court, by the party offering it, that the original is not under his control: *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103.

Copies of deeds duly filed for record in the recorder's office of the proper county, or which, after having been duly filed for record, have been recorded in the proper book of records, are admissible in evidence in all courts, and in all actions and proceedings with the like effect as the originals could be if produced, upon proof of the loss of the originals, or that they are not in the power of the party offering the copies: *McMinn v. O'Connor*, 27 Cal. 238.

A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not then in his power or control: *Hurlbutt v. Butenop*, 27 Cal. 54.

#### **Old Rule—Alcalde Records.**

Books of record of deeds, mortgages, and other instruments, kept by alcaldes previous to the organiza-



tion of the state government, which were transferred to the custody of the county recorder by the act of April 13, 1850, entitled "An act concerning the transfer of certain records, conveyances, and papers," have been placed by the twenty-first section of the act of March 26, 1851, entitled "An act concerning county recorders," upon a footing with other records kept by the county recorders; and certified copies of instruments found therein are admissible in evidence under the same circumstances as are certified copies of records made by the recorders themselves, namely, upon proof of the loss or the inability of the party to produce the originals: *Touchard v. Keyes*, 21 Cal. 202.

The twenty-first section of the act concerning county recorders of March 26, 1851, applies only to such records as are by that act required to be kept in the recorder's office. It has no application to the records of alcaldes, which, by a previous act, had been transferred to the custody of the recorders, and a copy from such records is not admissible upon the certificate of the recorder; per Norton, J., dissenting: *Touchard v. Keyes*, 21 Cal.. 202.

Certified copies of instruments found in the books of records of deeds, etc., kept by alcaldes, and which have been transferred to the custody of county recorders, are admissible in evidence under the same circumstances as are certified copies of records made by the recorders themselves: *Garwood v. Hastings*, 38 Cal. 216.

An entry of a grant of land in the pueblo de San Jose, made in the book of alcalde's grants, is entitled to be received in evidence upon proof that the persons by whom it is signed were the alcalde and clerk of said pueblo at the time it bears date, and that their signatures are genuine, and that the book was one of the books of the alcalde's office in which alcalde grants were entered, and that the book belonged to the recorder's office of Santa Clara county: *Downer v. Smith*, 24 Cal. 114.

**Old Rule—Mexican Grants—Records of Land Office and Records of Surveyor General's Office.**

Copy of Mexican grant, taken from United States surveyor general's office, is not admissible in evidence without accounting for the nonproduction of the original grant, where the party offering the copy does not rely upon a certified copy of the grant, under the act of 1857, but upon proof aliunde that the copy was correct: *Soto v. Kroder*, 19 Cal. 87.

Under the act of 1857 a copy of a Mexican grant, certified by the United States surveyor general to be a true and accurate copy of the grant on file in his office, is admissible in evidence "with the like effect as the original," without proof that the original could not be produced: *Soto v. Kroder*, 19 Cal. 87.

Such certified copies are admissible in evidence whenever the originals, if produced, would be admissible, the object of the statute being to remove objections to the copies, on the ground that they are secondary evidence: *Soto v. Kroder*, 19 Cal. 87.

Where it is proven that the signature of the governor and secretary of the department of California to a grant, at the time of its date, are genuine, then a copy duly certified under the act of 1857 is admissible in evidence: *Soto v. Kroder*, 19 Cal. 87.

A duly certified copy of a Mexican grant from the United States surveyor general's office is admissible in evidence against the objection that the absence of the original is not accounted for. But is admissible only when the original itself would be. The statute (Acts of 1857, p. 317) simply removes the objection to the copy as secondary evidence: *Natoma Water etc. Co. v. Clarkin*, 14 Cal. 544.

A sworn copy or exemplification of the expediente, consisting of the petition, plat, reference, report, act of concession, approval, grant, etc., on file in the archives of the Mexican government, is evidence, and the originals ought not to be removed from the government offices: *Gregory v. McPherson*, 13 Cal. 562.

Under sections 1919 and 1951 of the Code of Civil Procedure, it is not necessary to prove the loss of an

original patent before an exemplified copy thereof can be produced in evidence: *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647.

A certified copy of affidavit and claim under possessory act of this state is admissible in evidence if the party offering it has never had the original, and has made search for it and is unable to find it: *Roberts v. Unger*, 30 Cal. 676.

Certified copies of grants made by surveyor general of United States are inadmissible in evidence, unless the absence of the originals is accounted for: *Hensley v. Tarpey*, 7 Cal. 288.

An affidavit showing that the surveyor general had adopted a rule, refusing to allow the originals to be taken from the files, is a sufficient predicate: *Hensley v. Tarpey*, 7 Cal. 288.

#### **Particular Instruments—Powers of Attorney.**

A certified copy of the record of a power of attorney, which is entitled to record, is admissible in evidence: *Jones v. Marks*, 47 Cal. 242.

A certified copy from the recorder's office of a power of attorney purporting to have been executed by four persons, but acknowledged by one only, is admissible in evidence: *Spect v. Gregg*, 51 Cal. 198.

#### **Particular Instruments—Contracts.**

If, at the time of the sale of land, the grantor executes to the grantee, and acknowledges so as to entitle it to record, an instrument assigning to the grantee all moneys due, or to grow due, on account of sales or contracts of sales made by the grantor of portions of the land, and the instrument is recorded, a certified copy of it is admissible in evidence in an action in relation to an enforcement of the contract between the grantee and one who had made a contract of sale with the grantor: *Moss v. Atkinson*, 44 Cal. 3.

#### **Miscellaneous Instruments.**

Authenticated copy of record of deed is prima facie evidence of the genuineness, due execution, and deliv-

ery of the original deed: *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889.

Copy of letter from register of state land office to the county recorder, written in pursuance of section 46 of the act of March 28, 1868, and certified by the county recorder is admissible in evidence: *People v. Hagar*, 52 Cal. 171.

Under section 18 of the act of April 4, 1864, the records of a street assessment kept by the marshal of the city of Oakland, and signed by him, have the same force and effect as other public records, and copies therefrom, duly certified, are admissible in evidence with the same effect as the originals: *Alameda Macademizing Co. v. Williams*, 70 Cal. 534, 12 Pac. 530.

Copy of petition for formation of swamp land district, certified by the clerk of the board of supervisors, and a copy of the by-laws certified by the county recorder are admissible in evidence: *People v. Hagar*, 52 Cal. 171.

Certified copies from the office of the Secretary of State of the articles consolidating two or more railroads are admissible in evidence to prove such consolidation: *Vance v. Kohlberg*, 50 Cal. 346.

A certified copy of the order declaring a married woman a sole trader is admissible in evidence, even if, in the order, the judge uses the first person, as though it was made by him instead of the court, and the oath attached thereto appears upon its face to have been administered by the clerk: *Oaks v. Rodgers*, 48 Cal. 197.

A certified copy of the map in the office of the register of the United States land office is admissible upon the question of the character of the land: *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705.

In an action of trover against a partnership, a certified copy of the certificate of partnership, which tends to show that some of the defendants are members of the firm is competent evidence to prove the partnership, where there is nothing to show that any

new certificate has been filed: *Mortimer v. Marder*, 93 Cal. 172, 28 Pac. 814.

### **Instruments Defectively Acknowledged.**

Any instrument affecting real property, which was, previous to the first day of January, 1897, copied into the proper book of record kept in the office of any county recorder shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument, duly acknowledged and recorded; provided, it be first shown that the original instrument was genuine. (Amendment approved March 4, 1897, chapter 74. The original of this section was a new section approved March 30, 1874; Amendments 1873-74, p. 228.) Civ. Code, 1207.

Though a grantee in a deed cannot take and certify the acknowledgment of his grantor, and if he does so the certificate of acknowledgment as to him is void, yet where there are several grantees, each taking a separate and defined interest, the deed is to be treated as if made separately to each grantee, and an acknowledgment before one of the grantees is good and sufficient to prove the execution of the deed as to all of them except the party taking it: *Murray v. Tulare Irr. Co.*, 120 Cal. 311, 315.

### **Instruments Recorded Before Passage of Statutes.**

Copies of instruments of those classes entitled to record duly certified by the recorder which were copied into the proper books of record of the proper county prior to April 30, 1860, are admissible in evidence under the statute after proof that the originals are not under the control of the party offering such certified copies, or are lost and that the originals were

genuine instruments, and were in truth executed by the grantor or grantors therein named, notwithstanding such instruments were irregularly recorded, by reason of some defect, omission, or informality existing in the acknowledgment or certificate of acknowledgment of the same: *Landers v. Bolton*, 26 Cal. 393.

### **Conveyances Prior to Code.**

All conveyances of real property, made before this code goes into effect, and acknowledged or proved according to the laws in force at the time of such making and acknowledgment or proof, have the same force as evidence, and may be recorded, in the same manner and with the like effect as conveyances executed and acknowledged in pursuance of this chapter: Civ. Code, 1206.

### **Certified Copy—Sufficiency.**

A certified copy of a deed from the county recorder's office, contained in the margin of the acknowledgment, taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: (No seal), the conclusion of the acknowledgment being "In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal. Held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, was a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying: *Jones v. Martin*, 16 Cal. 165.

### **Copy of Certified Copy.**

Copy of certified copy of an original instrument, which has been lost, is not admissible in evidence to prove the contents of the original: *Dyer v. Hudson*, 65 Cal. 372, 4 Pac. 235.

In an action by a corporation, brought in the county in which its original articles of incorporation are filed, a copy certified by the Secretary of State, of the cer-

tified copy of such articles on file in his office is admissible in evidence to prove the organization of the corporation: *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22; *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

A copy of a copy of a muster-roll of United States soldiers is not admissible in evidence to prove a man to be a soldier: *People ex rel. Ormon v. Riley*, 15 Cal. 48.

## CHAPTER IV.

### MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

§ 1954. Material objects.  
Material objects.  
Sketches and diagrams.  
Experiments.  
Photographs.

#### § 1954. Material Objects.

Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, or character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

#### *Cross-references:*

See Jones on Evidence, chapter XIII—Real evidence.

#### **Material Objects.**

Articles found in the possession of the defendant at the time of his arrest, when properly identified, are admissible in evidence where there is some evidence tending to show that a portion of them was the property of the murdered man, and they were so



intimately connected with the case as to form part of the *res gestae* *People v. Smith*, 106 Cal. 73, 39 Pac. 40.

Boxes of prunes dried by the plaintiff, being a finished and separable part of the manufactured product, the character of which was in question, may be properly received in evidence for the defendants; and the question whether they were fair samples or not goes only to the weight of the evidence and not to its admissibility: *Thomas Fruit Co. v. Start*, 107 Cal. 206, 207.

Upon the trial of a defendant accused of murder, shirts and cuffs, found in a valise of the deceased in the possession of the defendant, were sufficiently identified to be received in evidence, where it appeared that other articles of the deceased were found in the valise, that one of the cuffs bore his initials, and that the laundry mark on the shirts corresponded with the laundry mark on a package containing the cuffs and shirts, which was entered in the books of the laundry: *People v. Westlake*, 134 Cal. 505, 507.

#### **Sketches and Diagrams.**

It is not error to permit a witness at the trial to use the sketch of a house or other object to explain his evidence as to the position of persons and objects, even though the sketch is not shown to be a correct representation, if the same be not introduced in evidence: *People v. Murphy*, 39 Cal. 52.

It is not error to exclude from jury a diagram where no drawing is necessary to illustrate the fact asserted: *Thrall v. Smiley*, 9 Cal. 529.

In an action of ejectment, where the question in controversy was the position of the red line, or waterfront, of San Francisco, held, that a diagram made by the county surveyor, and believed by him to be correct, though not an official plat, was admissible in evidence for the purpose of showing what the party offering it claimed to be the true position of such line: *People v. Klumpke*, 41 Cal. 236.

**Experiments,**

Evidence of experiments is admissible, in proper cases, when they are shown to have been made under essentially the same conditions as those which existed in the case on trial; otherwise such evidence is not admissible for the reason that its tendency is to mislead and confuse the jury; but it is not proper to say that such evidence is not admissible on any ground, nor is it objectionable merely because remote in time, or because not a proper subject of expert or opinion evidence, or because not impeaching evidence, or as being hearsay. The admission or rejection of such evidence is largely within the discretion of the court; and a case will not be reversed for an abuse of discretion by the court in rejecting such evidence, unless the evidence comes clearly within the principles by which it is allowed: *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833.

Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment was made when the conditions affecting the result were substantially identical; but this identity need not extend to nor be shown to exist, as to conditions which have had no casual operation upon the result: *County of Sonoma v. Stofen*, 125 Cal. 32, 57 Pac. 681.

**Photographs.**

Where a photograph, whether of persons, or things, or places, is shown to be a faithful representation of what it purports to reproduce, it is admissible, as an appropriate aid to the jury in applying the evidence: *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

Like any other diagrams, the value of the photographs must be determined by the jury from all the evidence; and they are not inadmissible hearsay merely because the places marked were pointed out by witnesses, if they testify that they were correctly pointed out, and the correctness of the marking is proved: *People v. Crandall*, 125 Cal. 129, 57 Pac. 785.

A photograph of the deceased, taken many years before the trial of a contest as to heirship, is irrelevant and inadmissible. A photograph of the deceased and

petitioner, made shortly before the trial, by bringing two negatives in juxtaposition, and from them making a third, may, perhaps, be admissible to show resemblance between the two, as bearing upon the question of paternity, but would be entitled to very little weight in view of frequent marked resemblances between strangers, and great dissimilarity between kindred: *Estate of Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028.

Where the prosecution desired to introduce the deposition of an absent witness taken at the preliminary examination, and placed a witness upon the stand, who testified to his efforts in trying to find the absent witness, it is not admissible upon cross-examination for the defense to offer a photograph of the absent witness to the jury for inspection: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

Photographic views are admissible as original evidence respecting the description of the premises in controversy; but error in excluding them is without prejudice when there is sufficient other evidence as to the topography involved in the inquiry: *Bliss v. Johnson*, 76 Cal. 597, 16 Pac. 542, 18 Pac. 785.

## CHAPTER V.

## INDIRECT EVIDENCE, INFERENCES, AND PRESUMPTIONS.

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  - Adverse possessions, presumptions as to.
  - Adoption, there is no presumption of.
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  - Agency, presumption of ratification of unauthorized act.
  - Agency, ratification, presumption as to.
  - Agent's authority, presumption of knowledge of.
  - Agent, presumption on purchase of principal's land by.
  - Arbitrators intend to decide according to law.
  - Appearance, presumption arising from.
  - Assessment, presumption in favor of.
  - Assessment, regularity of, presumption of.
  - Attorney's authority, presumption in favor of.
  - Attorney, presumption in favor of on proceeding for disbarment.
  - Attorney's compromise, presumption of consent to.
  - Attorney and client, communications between, presumed confidential.
  - Authority of city attorney to commence proceedings, presumption of.
  - Bankruptcy, presumption as to preference by debtor.
  - Ballots, presumption that ballots have not been mutilated.
  - Bills and notes, presumption of payment.
  - Bona fide holders, presumptions as to.
  - Business, presumed course of business followed.
  - Business, presumption that every man knows condition of his own.

Carriers, presumption against.  
Check, presumption arising from.  
Children, presumption as to competency to testify.  
Conclusive knowledge of state of one's own title.  
Fraud from want of change of possession.  
Common property, presumptions as to existence of.  
Commission, presumption that directed to properly qualified officer.  
Commitment, presumption of regularity of.  
Consideration is presumed to be fair.  
Consideration, presumption that consideration of deed was paid by grantee.  
Consideration, presumption of for check.  
Consideration, presumption of from writing.  
Consideration, presumption rebuttable.  
Contract, presumption of meaning of words used in contract.  
Contract, presumption that writing contained entire contract.  
Contract, presumption of validity of contract by corporation.  
Constitutionality of law, presumption in favor of.  
Corporation, presumption that corporation was organized for profit.  
Corporate existence, presumption of.  
Cancellation of stock, presumption from.  
Corporation, presumption that officer knows its usage.  
Corporation, presumption of right of to hold real estate.  
Damages presumed from trespass.  
Damages, presumptions as to.  
Demurrer, presumption as to action taken.  
Death, presumption from seven years' absence.  
Default, presumption of entry of.  
Defalcation, presumption as to time of.  
Delivery, presumption of from execution of deed.

Delivery of deed, presumption as to date of.  
Deed, presumption that deed contained premises demanded in ejectment.

Deed, absolute, presumption as to.

Diligence, presumption against.

Dishonor, presumption of.

Easement, presumption of grant of from user.

Erasures, presumptions as to time of making.

Execution sale, presumption of receipt of excess by debtor on not presumed.

Excusing grand juror, presumption in favor of.

Executrix, presumption as to receipt of assets by.

Executors, residence of, presumption as to.

Executors, presumption of regularity of order accepting resignation of.

Existence presumed to continue.

Fraud presumptions against.

Fraud from want of change of possession.

Fraud never presumed.

Gift, presumption of on deed from husband to wife.

Grand jurors, presumptions in favor of acts of.

Guest, one going to inn presumed to be.

Guilt, presumption of on application to reduce bail.

Guilt, presumption as to degree of.

Grant presumption of, from possession.

Heir, presumption of existence of.

Incompetent, vendor is not presumed to be.

Indictment, decision on motion to set aside, presumption in favor of.

Indictment, presumption in favor of.

Innocence, presumption of.

Intent, that one intends the result of his acts.

Intent and malice, presumptions as to.

Insanity, presumptions as to.

Insolvency, presumption of from assignment.

Joint tenancy, presumption as to.

Judgments, presumptions in favor of.

Judgments, presumption that judgment as entered was authorized.

Jurisdiction over insolvency proceedings, presumptions as to.

Jurisdiction of county courts, and court of sessions, presumption in favor of.

Jurisdiction, presumption in favor of.

Jurisdictional facts, presumption that petition contains.

Jurors, presumption of performance of duty by.

Knowledge on part of subcontractor, presumption as to.

Law presumed to be obeyed.

Legitimacy, presumption as to.

Mail, presumptions from mailing of letters.

Malice, presumptions as to.

Malice, presumption from unlawful act.

Map and survey, conflict between, presumption on.

Marriage presumed to be in ignorance of life of former spouse.

Marriage, how far presumed from cohabitation.

Married woman's contract, presumptions against.

Ministerial acts, no presumption in favor of.

Name, identity of presumption of identity of person.

Negligence, presumptions as to.

Negligence, presumption of from accident.

Notary's certificate, presumption in favor of.

Notice, presumption of giving of.

Notice of director's meeting, presumption of.

Notice of illegality of note, presumption of.

Novation, contract of, not presumed.



Official integrity, presumption in favor of.  
Office, validity of appointment to is presumed.

Officer, qualification of, presumption of.

Order of court, presumptions in favor of.

Ordinances, presumption in favor of.

Organization of toll-road, validity of, presumption of.

Official action—Presumption on review of action of supervisors in rejecting a claim.

Official action—Presumption that elisor did his duty.

Official action—Presumption that that which ought to have been done was rightly done.

Official action—Presumption of performance of official duty.

Official action—Presumption in favor of.

Ownership—Presumption from possession.

Payment—Presumption as to kind of money in which notary demanded payment.

Payment of rent after term expires, presumption arising from.

Probate proceedings, presumptions in favor of.

Professional visits presumed to be necessary.

Regularity of private transactions presumed.

Salary, no presumption of regular appointment to office.

Sentence and judgment, presumption in favor of.

Sidewalks presumed to be safe.

Street contract, presumption of regularity of.

Signature, drawee presumed to know, of drawer.

Signature, presumption that each obligor signed on condition that others would sign.

Signature, presumption of genuineness of official.

State of mind, presumed to continue.  
Suppressed evidence, presumed adverse.  
Survivorship, presumption as to.  
Taxes, order on equalization of, presumption.  
Tax, action for delinquent, presumptions in.  
Tax deed, presumptions as to.  
Title in grantee, presumption of.  
Uniform, procedure, presumption arising from.  
Undue influence, presumption as to.  
Viewers, validity of appointment of.  
Wills, presumptions in favor of validity.  
Witness, presumption that they speak the truth.

### § 1957. Indirect Evidence. Classified.

Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

#### *Cross-references:*

Indirect evidence in general, section 1832; inferences defined, section 1958; presumptions defined, section 1959; when inferences arise, section 1960; when presumptions may be controverted, section 1961; conclusive presumptions, section 1962; disputable presumptions, section 1963; what presumptions may be proven, section 1870; instructions as to admissions, section 2061, subdivision 4; facts may be proven from which other facts are logically inferred, section 1870, subdivision 15.

See Jones on Evidence, chapters II, III—Presumptions.

#### **A Presumption is Evidence.**

The presumption is against the party who has the burden of proof, and if no evidence be introduced, the finding should be in accordance with such pre-

sumption. If the court errs as to the presumption, the finding is against the evidence, and can be reviewed on that ground. A presumption is evidence: *Monterey County v. Cushing*, 83 Cal. 507, 510.

### § 1958. Inference Defined.

An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

#### *Cross-references:*

See cross-references under preceding section.

See Jones on Evidence section 9—Presumptions of fact.

#### **Inferences.**

Inferences fall within the exclusive province of the jury. It is erroneous for the court to charge a jury that the existence of a fact proved raises a reasonable presumption of the existence of another fact: *People v. Walden*, 51 Cal. 588; *McKeever v. Market St. R. Co.*, 59 Cal. 294, 300.

#### **Distinction Between Possible and Mandatory Inference.**

Whether a particular inference can under any circumstances be drawn from certain evidence is a question of law, but whether the inference shall in any particular case be drawn from the evidence is a question of fact: *Wallace v. Sisson*, 114 Cal. 42, 46.

### § 1959. Presumption Defined.

A presumption is a deduction which the law expressly directs to be made from particular facts.

#### *Cross-references:*

Presumptions, how controverted, section 1961; conclusive presumptions, section 1962; disputable presumptions, section 1963; presumptions arising from judicial

orders, section 1909; presumptions arising from foreign judgment, section 1915; presumption that witness speaks the truth, section 1847; how repelled, section 1847.

See Jones on Evidence, section 8—Presumptions—In general.

**Cannot be Two Opposing Presumptions in a Criminal Case.**

But a presumption, by which in our code is meant a presumption of law, is a different thing. In the case of an inference the jury are the exclusive judges of the weight and validity of the inference; in the latter they are bound by the presumption unless controverted by other evidence. Whether, in any case, there is a legal presumption—as opposed to an inference—of the previous chastity of a woman, need not be determined; but as against the presumption of the innocence of one accused of crime, there can be no such presumption. “There cannot be two presumptions in a criminal case. The accused is presumed to be innocent until his guilt is established beyond a reasonable doubt”: 130 Cal. 1, 6.

**Illicit Intercourse Presumed to Continue.**

The distinction between a presumption of law, and one of fact or an inference from facts, is sometimes very thin, but treating the question arising on the testimony here as one of fact, it is both logical and just to hold that a connection illicit in its origin will be presumed to continue to be so until some change is established by evidence: *White v. White*, 82 Cal. 427, 438.

**§ 1960. Inference, How Founded.**

An inference must be founded—

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual pro-

pensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

*Cross-references:*

Inferences defined, section 1958; indirect evidence in general, section 1832; facts may be proven from which other facts are logically inferred, section 1870, subdivision 15; witness must testify of his own knowledge except where inference is admissible, section 1845; presumption as to ordinary course of business, section 1963, subdivision 20; presumption that things have happened according to the course of nature and ordinary habits of life, section 1963, subdivision 28; witness must testify to fact from which fact in issue is presumed notwithstanding answer tends to degrade him, section 2065.

See Jones on Evidence, section 9—Presumptions of fact.

**Courts Cannot Define Inferences in Specific Cases.**

Under our constitution, which prohibits the courts from charging upon matter of fact, a court cannot instruct a jury that any fact is an "inference" from another fact: *People v. Riley*, 75 Cal. 98, 100.

**Inference from the Course of Business.**

Appellant claims that there is no evidence to support the finding that the note was entered as satisfied and canceled upon the books of the bank. There is no direct evidence to that effect. The books of the bank were not introduced, and that part of the finding, if it has support, must derive it from the inference drawn from the fact of delivery and its circumstances—a deduction from this fact warranted by the course of business: *Savings etc. Soc. v. Burnett*, 106 Cal. 514, 529.

**§ 1961. Presumption May be Controverted.**

A presumption (unless declared by law to be

conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.

*Cross-references:*

Jury to be instructed as to the effect of presumptions, section 2061, subdivision 2; conclusive presumption, section 1962; disputable presumption, section 1963; direct evidence defined, section 1831; indirect evidence defined, section 1832; witness must answer to a fact from which the fact in issue would be presumed; notwithstanding answer tends to degrade him, section 2065.

See Jones on Evidence, section 10—Presumptions of law—Conclusive and disputable.

**Presumptions in General.**

Presumptions are only indulged to supply absence of facts. There can be no presumption against ascertained and established facts: Nieto v. Carpenter, 21 Cal. 455.

Presumption of law that is disputable when not changed by evidence becomes to the court a rule indisputable for the case, and the court is bound to apply it: Kidder v. Stevens, 60 Cal. 414.

Presumptions of fact fall within exclusive province of jury, and it is, therefore, erroneous for the court to charge a jury that the existence of a fact developed in the evidence raises a reasonable presumption of the existence of another fact: People v. Walden, 51 Cal. 588.

**Rebuttal Need not be Overwhelming.**

Property purchased during coverture is presumptively community property; but this presumption is disputable, and may be overcome by clear and certain proof that the property, or a part thereof, was purchased with separate funds. Such evidence need not be overwhelming: In re Bauer, 79 Cal. 304, 307.

**Presumption of Execution from Notary's Certificate.**

The facts recited in a notary's certificate of acknowledgment attached to a receipt and release from liability for a breach of promise of marriage, pursuant to section 1948 of the Code of Civil Procedure, are only prima facie evidence of the execution of the instrument, and are not conclusively presumed to be true. The rule applicable to acknowledgments of conveyances by married women does not apply; and the facts recited in such certificate may be contradicted by any evidence, direct or indirect. An instruction that the evidence of the party named in the certificate, denying the genuineness and due execution of the instrument, is not sufficient to overcome the certificate, should be refused: *Moore v. Hopkins*, 83 Cal. 270, 272.

**Presumption—Of Fraudulent Intent.**

The presumptions that every man knows the condition of his own business, and that every man intends the consequences of his acts, are disputable, and an inference of the fact of fraudulent intent from a deed of gift by an insolvent debtor to his wife, which might rest upon those presumptions, is overcome by a finding that he was ignorant of the fact of his insolvency: *Bull v. Bray*, 89 Cal. 286, 295.

**Presumption—Of Delivery on Day of Date.**

In an action by the children of the deceased husband by a former marriage, to set aside his conveyance to his second wife, where there was no evidence tending to sustain the charge of undue influence, and near the close of plaintiff's evidence the deed was called for from the possession of the defendant and placed in evidence by the plaintiff, which showed that it was acknowledged on the day of its date, the allegation of plaintiff's complaint, that it was not delivered, was disproved by the presumption of law that it was delivered at its date, which, not being controverted, bound the jury or the court to find according to the presumption: *McDougall v. McDougall*, 135 Cal. 316, 319.

**§ 1962. Conclusive Presumptions.**

The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there



be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive.

*Cross-references:*

Conclusive evidence defined, section 1837; no evidence is conclusive unless so declared by the code, section 1978; judgments and orders, when conclusive, section 1908; recitals in statutes, when conclusive, section 1903.

Subdivision 1. An inference must be founded on such a deduction and from a proven fact, as is warranted by a consideration of the usual propensities or passions of men of the particular person in question, section 1960; disputable presumption arises that an unlawful act was done with an unlawful intent, section 1963, subdivision 2; that a person intended the ordinary consequences of his voluntary act, section 1963, subdivision 3.

Subdivision 2. Recitals in public statutes, section 1903; recitals in private statutes, section 1903; recitals of contents of lost instrument as evidence, section 1937; admissions in general, section 1870, subdivisions 2, 3 and 4, and cross-references thereunder; presumption that promissory note was founded on sufficient consideration, section 1963, subdivision 21; presumption that there is a good and sufficient consideration for a written contract, section 1963, subdivision 39; parol evidence inadmissible to vary written contract, section 1856; declarations of predecessor in title, section 1849.

Subdivision 3. Tenant is estopped to deny his landlord's title, section 1962, subdivision 4; presumption that acquiescence follows from a belief that the thing acquiesced in was conformable to right and fact, section 1963, subdivision 27; when party is estopped to deny execution of written contract, section 1942; evidence may be given on the trial of an act, declaration, or omission of a party, section 1870, subdivision 2; of

an act or declaration of another in the presence of a party, section 1870, subdivision 3; evidence of oral admission should be viewed with caution, section 2061, subdivision 4; confessions in actions for divorce, section 2079; transactions as part of the *res gestae*, section 1850.

Subdivision 5. Presumption that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage, section 1963, subdivision 30; presumption that a child born in lawful wedlock is legitimate, section 1963, subdivision 31.

Subdivision 6. Judgment or final order in an action of special proceeding before court or judge of this state, or of the United States, when conclusive, section 1908, and cross-references thereunder; party when bound by judgment against surety, section 1912; judicial records of sister states, section 1913.

See Jones on Evidence.

Subdivision 1, section 24.

Presumptions as to malice, section 24.

Subdivision 2, section 44.

Presumptions that documents have been duly executed, section 44.

Subdivision 3, section 281.

Erection of improvements—Boundary lines—The act must be calculated to mislead, and must actually mislead, section 281.

Subdivision 5, sections 92-94.

Presumption of legitimacy, section 92.

Same—How rebutted, section 93.

Same—Conclusive, if sexual intercourse between husband and wife is shown, section 94.

### **Presumption from Spoliation.**

When evidence has been voluntarily and deliberately destroyed, presumption becomes conclusion that the destruction was for fraudulent purposes which its production would defeat: *Pagley v. McMickle*, 9 Cal. 430.

All children born in wedlock are presumed to be legitimate: Civ. Code, 193.

**Conclusive Presumptions in General.**

On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To conclude a party by an arbitrary rule from adducing evidence in his favor is an act which can only be justified by the clearest expediency and soundest policy; and some presumptions of this class ought never to have found their way into it: *Bull v. Bray*, 89 Cal. 286, 295.

Counsel say this rule is only a presumption of evidence, and since it is not included in the presumptions mentioned in section 1962 of the Code of Civil Procedure, it may be rebutted by evidence. But the law that the domicile, or, more accurately, the forum, of the wife is where the husband is domiciled, although she is actually living in a different place, is not a rule of evidence. It is a law to which there are some exceptions, and the presumption as to a particular case is that it is controlled by the general rule, unless it is shown that it is within some exception: *Estate of Wickes*, 128 Cal. 270, 274.

**Estoppel in Pais.**

The plaintiff having, by her agent, introduced the person who executed this mortgage to the notary by the name of Alexander Wilson, and that, too, for the express purpose of making him known to the notary by that name, and having the notary take and certify his acknowledgment to the mortgage by that name, she cannot now be permitted to falsify that introduction, or the declaration thus made that he was Alexander Wilson: *Overacre v. Blake*, 83 Cal. 77, 83.

Under our code it will be presumed "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage": Code Civ. Proc., sec. 1963, subd. 30. And after a quarter of a century of that kind of deportment toward each other and toward the world, the parties ought to be estopped to deny such presumption: *White v. White*, 82 Cal. 427, 453.

In an action of replevin against a sheriff, an answer which alleges justification under writs of attachment and execution, and avers that the levy was made in sole reliance upon the statement of the plaintiff that he held possession of the property as the pledgee of the execution debtor, who was the owner thereof, sufficiently pleads an estoppel under section 1962, subdivision 3, of the Code of Civil Procedure; and the plaintiff, upon such facts being proved, is estopped from denying the truth of the statements made by him, and from setting up title to the property in anyone but the execution debtor: *Barnhart v. Fulkerth*, 90 Cal. 157, 162.

Where a broker or agent employed by the vendors of real estate in the sale of it falsely represented to the vendors that he had received a deposit on account of the sale, when he had in fact taken what proved to be a worthless note, and had full knowledge of the falsity of the statement of which the vendors were ignorant, and the vendors, relying upon the statement as true were induced thereby to approve of the contract of sale, the agent is bound to make good his statement, and is estopped from showing its falsity to the injury of the vendors, and the amount of the alleged deposit may be recovered from him as money received for the use of the vendors: *Wood v. Blaney*, 107 Cal. 291, 295.

Where a person is employed by the month under an express contract for a fixed salary or wage, or under an implied contract for the reasonable value of his services, and the employer delivers to the employee, at the end of each successive month, a statement of his account, showing the time employed, and the rate of wages or salary, allowed and especially where, upon the face of the account, is indorsed an express request that the employee will examine it and give immediate notice of any error, the failure to object to the account within a reasonable time is a deliberate admission that the rate of compensation stated in the account is agreed upon, and that the employment is to be continued upon the same terms until there is a new agreement; and the employer must be deemed to have acted upon such admission,

as otherwise he would be deprived of his option to terminate the employment upon notice that more is expected than he has offered to pay, and the employee is estopped to claim a higher rate than that so agreed upon: *Shade v. Sisson M. & L. Co.*, 115 Cal. 357, 365.

Where the business of a former bank kept by the president of the banking company was turned over to it, as successor thereof, and the former bank ceased to do business and the cashier of the latter issued its own pass-books to the depositors in the former bank, for the balance of their accounts, whereupon they became the customers of the banking company, and its cashier, without any objection from its directors, kept those accounts and rendered statements thereof, showing a transfer from the former bank, and its depositors were thereby induced to believe and act upon the belief that the deposits and the accounts thereof had been properly transferred to and assumed by the banking company, it is bound by the action of its cashier, and is estopped from questioning its liability upon such accounts: *Nicholson v. Randall Banking Co.*, 130 Cal. 533, 539.

One who executed a mortgage as attorney in fact for his grantor, from whom he held an unrecorded deed, and who represented to the mortgagee, who advanced money upon the faith of the mortgage, that his principal was the owner of the land mortgaged, is estopped from setting up title in himself, except in subordination to the mortgage; and the estoppel is equally binding upon his wife, who succeeded to his interest, as distributee of his estate: *Filipini v. Trobock*, 134 Cal. 441, 444.

#### **Landlord's Title, Denial of, Rule Strictly Limited.**

An upper riparian proprietor who enters into an agreement, purporting to be a lease, with a lower proprietor, whereby the latter grants to him for a certain term the right to the use of the waters of the adjoining stream for domestic purposes and irrigation is not, upon the expiration of the agreement, estopped from asserting his right as a riparian proprietor to the use of the water of the stream: *Swift v. Goodrich*, 70 Cal. 103, 105.

**Legitimacy, Presumption from Cohabitation of Parents.**

In the provision of subdivision 5 of section 1962 of the Code of Civil Procedure, that "the issue of a wife cohabiting with her husband, who is not impotent is indisputably presumed to be legitimate," the word "cohabiting" means the living together of a man and woman ostensibly as husband and wife; and neither of them is a competent witness to prove the absence of sexual intercourse during their cohabitation, nor that a child born during such cohabitation was the illegitimate child of another man, if the husband is not shown to have been impotent: *Estate of Mills*, 137 Cal. 298, 301.

**Recitals in Writings, Conclusiveness.**

An undertaking was given to obtain the release of personal property from attachment. The undertaking recited the commencement of the attachment suit, and that certain property of the defendant therein had been seized by the sheriff under the attachment. The only property attached was a vessel known as the "Startled Fawn," and on the giving of the undertaking the property was released. Held, that the recitals in the undertaking were conclusive as between the parties, and that the sureties were precluded from showing that the property did not belong to the defendant in the attachment suit: *Pierce v. Whiting*, 63 Cal. 538, 540.

Where a sale of personal property is procured by fraud, the ownership of the property is not changed, unless the seller in some way afterward ratifies the sale; and in the absence of a ratification, the seller may maintain an action to recover possession of the property or damages for its conversion: *Amer v. Hightower*, 70 Cal. 440, 442.

The language of the mortgage, as set out in the complaint, although not as definite as might be desired, is sufficient to show, in the absence of any proof to the contrary, that the note was signed by Waldrip as a surety merely, and no demurrer having been filed pointing out any special defects of the complaint,

the judgment should not be reversed for the want of a sufficient allegation of the plaintiff's suretyship. The genuineness of the mortgage is not controverted, and its recitals are to be held as true: *Waldrip v. Black*, 74 Cal. 409, 411.

Had the mortgage been genuine, the recital therein setting out the note would have been conclusive against the mortgagor of the due execution of the note: *Heidt v. Minor*, 113 Cal. 385, 389.

The note secured by the mortgage was given and made payable at Gridley in the state of California, and the mortgage recited, as before stated, that Scamman was a resident of this state. The recital of the residence is conclusive: *Scamman v. Bonslett*, 118 Cal. 93, 99.

#### **Recitals of Consideration not Conclusive.**

The grantee may prove by parol that the consideration was wholly different from that expressed in the deed: *Moffat v. Bulson*, 96 Cal. 106, 110; *Field v. Austin*, 131 Cal. 379, 383.

The recital in a mortgage upon the wife's property to secure the husband's antecedent debt that she and her husband are jointly and severally indebted to the mortgagees for goods received by them cannot estop the wife or forbid inquiry into the consideration of the mortgage: *Chaffee v. Browne*, 109 Cal. 211, 220.

#### **§ 1963. Disputable Presumptions.**

All other presumptions are satisfactory, if contradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.
2. That an unlawful act was done with an unlawful intent.

3. That a person intends the ordinary consequence of his voluntary act.

4. That a person takes ordinary care of his own concerns.

5. That evidence willfully suppressed would be adverse if produced.

6. That higher evidence would be adverse from inferior being produced.

7. That money paid by one to another was due to the latter.

8. That a thing delivered by one to another belonged to the latter.

9. That an obligation delivered up to the debtor has been paid.

10. That former rent or installments have been paid when a receipt for latter is produced.

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.

13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.

14. That a person acting in a public office was regularly appointed to it.



15. That official duty has been regularly performed.

16. That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusive does still correctly determine or set forth the rights of the parties.

18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.

19. That private transactions have been fair and regular.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed was received in the regular course of the mail.

25. Identity of person from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

28. That things have happened according to the ordinary course of nature and the ordinary habits of life.

29. That persons acting as copartners have entered into contract of copartnership.

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

32. That a thing once proved to exist continues as long as is usual with things of that nature.

33. That the law has been obeyed.

34. That a document or writing more than thirty years old, is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

35. That a printed and published book, pur-

porting to be printed or published by public authority, was so printed or published.

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases.

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

39. That there was a good and sufficient consideration for a written contract.

40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

First—If both of those who have perished were:

under the age of fifteen years, the older is presumed to have survived.

Second—If both were above the age of sixty, the younger is presumed to have survived.

Third—If one be under fifteen and the other above sixty, the former is presumed to have survived.

Fourth—If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth—If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

*Cross-references:*

Satisfactory evidence defined, section 1835; conclusive presumptions, section 1962; presumption defined, section 1959; jury to be instructed as to effect of presumptions, section 2061, subdivision 2; indirect evidence defined, section 1832; classified, section 1957; when presumptions may be controverted, section 1961; jury must find according to presumption, unless controverted, section 1961.

Subdivision 1. Presumption that the law has been obeyed, section 1963, subdivision 33; presumption as to marriage, section 1963, subdivision 30; presumption as to legitimacy, section 1962, subdivision 5, and section 1963, subdivision 31.

Subdivision 2. Guilty intent when conclusively presumed, section 1962, subdivision 1; presumption that person intends ordinary consequence of his voluntary act, section 1963, subdivision 3.

Subdivision 3. Presumptions as to unlawful intent, section 1962, subdivision 1, and section 1963, subdivision 2.

Subdivision 5. Primary evidence defined, section 1829; secondary evidence defined, section 1830; presumption of introduction of inferior evidence, section 1963, subdivision 6; jury to be instructed that evidence is to be estimated according to the power of one side to produce, and the other to contradict, subdivision 2061, subdivision 6; jury to be instructed that if weaker and less satisfactory evidence is offered, it should be viewed with distrust, section 2061, subdivision 7.

Subdivision 6. Primary evidence defined, section 1829; secondary evidence defined, section 1830, and see cross-references under subdivision 5.

Subdivision 7. Presumption that private transactions have been fair and regular, section 1963, subdivision 19; that ordinary course of business has been followed, section 1963, subdivision 20; presumptions as to payment, section 1963, subdivisions 9, 13; person paying money is entitled to receipt, section 2075; presumption that person takes ordinary care of his own concerns, section 1963, subdivision 4.

Subdivision 8. Presumptions from possession, section 1963, subdivision 9; section 1963, subdivision 11; section 1963, subdivision 12; section 1963, subdivision 13.

Subdivision 9. Presumption of payment from delivery of order, section 1963, subdivision 13; presumption as to payment of rent, section 1963, subdivision 10; presumption that private transactions have been fair and regular, section 1963, subdivision 198; presumption that the ordinary course of business has been followed, section 1963, subdivision 20; debtor entitled to receipt, section 2075; presumption that promissory note or bill of exchange was entries for consideration, section 1921.

Subdivision 10. Presumption as to payment, section 1963, subdivision 7, and cross-references thereunder; section 1963, subdivision 9, and cross-references thereunder.

Subdivision 11. Presumptions from possession, section 1963, subdivision 8, and cross-references thereunder.

Subdivision 12. Presumptions of ownership over possession and certificate of purchase of location, section 1925.

Subdivision 13. Presumption that an obligation delivered has been paid, section 1963, subdivision 12; presumption that ordinary course of business has been followed, section 1963, subdivision 20.

Subdivision 14. Presumption that an official duty has been regularly performed, section 1963, subdivision 15; presumption that judge is acting in lawful exercise and jurisdiction, section 1963, subdivision 16; presumption that the law has been obeyed, section 1963, subdivision 33.

Subdivision 15. Presumption of regularity, see subdivision 14, and cross-references thereunder.

Subdivision 16. Presumption of regularity, see subdivision 14, and cross-references thereunder.

Subdivision 17. Presumptions created by final orders other than judgments and final orders, section 1909; presumption created by judgment of foreign country, section 1915; of sister state, section 1913.

Subdivision 18. What is deemed adjudged in a foreign judgment, section 1911; substance of the issue must be proven, subdivision 1868.

Subdivision 19. Presumption that ordinary course of business has been followed, section 1963, subdivision 20; that person takes ordinary care of his own concerns, section 1963, subdivision 4; presumption from acquiescence, section 1963, subdivision 27; as a consideration, section 1963, subdivisions 21, 22, 39; entries of decedents, section 1946, and citations thereunder.

Subdivision 20. Inferences from usual course of business, section 1960; presumption of regularity of private transactions, section 1963, subdivisions 19, 21, 23, 24, 28, 39; as to entries kept in regular course of business, section 1947.

Subdivision 21. Presumptions as to consideration, section 1963, subdivisions 9, 13, 22 and 39.

Subdivision 22. See cross-references under preceding subdivision; contract construed according to *lex loci*, section 1857.

Subdivision 23. Presumption that ordinary course of business has been followed, section 1963, subdivision 20, and cross-references thereunder; estoppel by recital, section 1962, subdivision 2.

Subdivision 24. Ordinary course of business has been followed, section 1963, subdivision 20; inferences from ordinary course of business, section 1960.

Subdivision 26. Other presumptions as to death, section 1963, subdivision 40.

Subdivision 27. Estoppel by declaration, act or omission, section 1962, subdivision 3; estoppel to deny execution of written contract, section 1942.

Subdivision 28. Inferences founded on ordinary course of nature and ordinary habits of life, section 1960; presumptions as to contents, section 1963, subdivision 32.

Subdivision 29. Declarations of person when binding, section 1870.

Subdivision 30. Presumption that law has been obeyed, section 1963, subdivision 30; presumption of innocence, section 1963, subdivision 1.

Subdivision 31. Presumption as to legitimacy when conclusive, section 1962, subdivision 5.

Subdivision 32. Presumption that things have happened in the ordinary course of nature, section 1963, subdivision 28.

Subdivision 33. Presumption of innocence, section 1963, subdivision 1; as to money paid, section 1963, subdivision 7; as to payment of rent, section 1963, subdivision 10; as to de facto officers, section 1963, subdivision 14; as to performance of official duty, section 1963, subdivision 14; as to exercise of jurisdiction, section 1963, subdivision 16; as to correctness of judicial record, section 1963, subdivision 17; as to regularity of private transactions, section 1963, subdivision 19; as to conclusions, section 1963, subdivision 27; as to copartnership, section 1963, subdivision 29; as to marriage, section 1963, subdivision 30; as to legitimacy, section 1963, subdivision 31.

Subdivision 34. Proof of execution of ancient writings, section 1945.

Subdivision 35. Books under authority of sister state are evidence of the written law thereof, section 1900; books under authority of sister state are evidence of the unwritten law, section 1902.

Subdivision 36. Books published under authority of sister state containing reports of cases are evidence of the unwritten law thereof, section 1902.

Subdivision 37. Trusts relating to real property must be in writing, section 1971; power of court to compel specific performance, section 1972; presumption that law has been obeyed, section 1963, subdivision 33, and cross-references thereunder.

Subdivision 39. Presumption that private affairs have been regular, section 1963, subdivision 19; that ordinary course of business has been followed, section 1963, subdivision 20.

See Jones on Evidence.

Subdivision 1, sections 11-15.

Presumption of innocence, section 11.

Same—Applications of the presumption—Fraud and similar issues, section 12.

Same—As applied to the marriage relation, section 13. Negligence, section 14.

Effect of the presumption of innocence as to the amount of evidence, section 15.

Subdivision 3, section 23.

Presumption that men know the consequences of their acts, section 23.

Subdivision 5, sections 16-19.

Presumption arising from the spoliation or fabrication or suppression of evidence, section 16.

Presumptions from withholding evidence, section 17.

Same subject—Qualifications of the rule, section 18.

Same—Effect of the presumption on the burden and degree of proof, section 19.

Subdivision 6, section 18.

Presumptions from withholding evidence—Qualifications of the rule, section 18.

Subdivision 9, section 67.

Presumptions of payment from usual modes of business, section 67.



Subdivision 11, section 71.

Presumption of ownership from possession, section 71.

Subdivision 12, section 72.

The presumption of title from the possession of lands, section 72.

Subdivision 13, sections 67, 68.

Presumptions of payment from usual modes of business—Receipts, section 67.

Cancellation of instruments, section 68.

Subdivision 14, sections 36, 37.

Presumption of authority from acting in official capacity, section 36.

Same subject—Not restricted to official appointments, section 37.

Subdivision 15, sections 38, 40.

Performance of official duty, section 38.

Same—Acts of municipal officers, section 39.

Other illustrations and limitations upon the rule, section 40.

Subdivision 16, sections 26, 633, 635.

Regularity of judicial proceedings—Jurisdiction, section 26.

Foreign judgments—May be impeached for fraud or want of jurisdiction, section 633.

Judgments of sister states—Want of jurisdiction may be shown—Regularity presumed—Proof of fraud, section 635.

Subdivision 18, section 29.

Regularity of proceedings subsequent to gaining jurisdiction, section 29.

Subdivision 19, sections 12, 42.

Presumption of innocence—Applications of the presumption—Fraud and similar issues, section 12.

Presumptions of regularity in unofficial acts—In general, section 42.

Subdivision 20, sections 67-70.

Presumptions of payment from usual modes of business, section 67.

Cancellation of instruments, section 68.

Same subject—Application of payments to debts first due, section 69.

Settlement presumed from accepting note, section 70.

Subdivision 21, section 43.

Same as to negotiable paper, section 43.

Subdivision 22, section 43.

Same as to negotiable paper, section 43.

Subdivision 23, sections 44, 45.

Presumptions that documents have been duly executed, section 44.

Dates, when presumed correct, section 45.

Subdivision 24, section 46.

Presumptions as to the mailing and receipt of letters, section 46.

Subdivision 25, section 99.

Presumption as to identity, section 99.

Subdivision 26, section 57.

Presumptions of death after seven years' absence, section 57.

Subdivision 27, section 291.

Admissions may be implied from silence, section 291.

Subdivision 29, section 48.

Presumptions arising from partnership dealings, section 48.

Subdivision 30, sections 85, 86.

Presumptions as to marriage, section 85.

Cohabitation and reputation to concur—Weight of presumption, section 86.

Subdivision 31, sections 92-96.

Presumption of legitimacy, section 92.

Same—How rebutted, section 93.

Same—Conclusive if sexual intercourse between husband and wife is shown, section 94.

Same—Relevant facts when sexual intercourse between husband and wife is not shown, section 95.

The husband or wife not allowed to deny sexual intercourse, section 96.

Subdivision 32, sections 52-55, 655-698.

Presumption as to continuance of the existing state of things, section 52.

Same—As to ownership, possession, etc., section 53.

Other illustrations of the rule, section 54.

Presumptions as to sanity and insanity, section 55.

Subdivision 34, section 544.

Exception—Ancient documents, section 544.

Subdivision 37, section 76.

Presumption that trustees have made proper conveyances, section 76.

Subdivision 40, section 60.

Presumption of survivorship in common disaster, section 60.

### **Abandonment, Presumption of.**

The law will not presume an abandonment of property in a dam and ditch for mining purposes from the lapse of time: *Partridge v. McKinney*, 10 Cal. 181.

### **Acceptance, Presumption of.**

It is scarcely to be presumed that one man will execute to another a deed without the assent of that other: *Bensley v. Atwill*, 12 Cal. 231.

If the donee be of mature years he will be presumed to have accepted it, if it be for his advantage, unless the contrary appears: *De Levillain v. Evans*, 39 Cal. 120.

Where a mortgage was given to an infant in compliance with the terms of the will, a voluntary acceptance by the infant was unnecessary, since the law compelled her acceptance; she took under the will, and was bound by its terms: *Aldrich v. Willis*, 55 Cal. 81, 86.

### **Acceptance of Dedication, Presumption of.**

Though an offer to dedicate is not complete until accepted on the part of the public, yet, when an actual dedication has taken place, an acceptance is presumed from the benefit arising from such dedication, even though there may not be imposed upon the public an obligation to make expenditures upon the streets: *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839.

### **Acceptance of Act Passed for One's Benefit, Presumption of.**

Where law is passed for special benefit of party, his acceptance of it will be presumed: *Spring Valley Water Works v. San Francisco*, 22 Cal. 434.

**Acquiescence of Owner of Land in User, Presumption from.**

Where a road has been used and traveled by the public for more than ten years without objection by the owners of the land over which the road runs, the legal presumption is that the owners have abandoned possession of the land for the road, and that the road so established upon the land is a public highway: *Patterson v. Munyan*, 93 Cal. 128, 29 Pac. 250.

Where no objections are made by the owners of land or their predecessors for more than five years to the use of the land by the public for a public road, the legal presumption is that the owners abandoned possession of the land for the road: *Plummer v. Sheldon*, 94 Cal. 533, 29 Pac. 947.

**Adverse Possessions, Presumptions as to.**

When the statute of limitations is pleaded in ejectment, and it is admitted on the trial that the defendant has been for more than five years in possession it will be presumed that his possession was in subordination to the legal title unless it is either admitted or found as a fact that his possession was adverse: *Sharp v. Daugney*, 33 Cal. 505.

**Adoption, There is no Presumption of.**

There is no presumption that minor children living with a man who is not their father have been adopted by him: *Estate of Romero*, 75 Cal. 379, 17 Pac. 434.

**Against Party Who has Burden of Proof.**

Presumption is against party who has burden of proof, and, if no evidence be introduced, the finding should be in accordance with such presumption. If the court err as to the presumption the finding is against the evidence, and can be reviewed on that ground: *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700.

**Agency, Presumption of Ratification of Unauthorized Act.**

No presumption of a ratification of an alleged sale under a power can be indulged, unless knowledge of

the alleged sale, with its attendant circumstances, is brought home to the grantee of the power: *Dupont v. Wertheman*, 10 Cal. 354; *Maze v. Gordon*, 96 Cal. 61, 30 Pac. 962.

**Agency—Ratification, Presumption as to.**

If the court finds as a fact that one person executed a written instrument for another as his attorney in fact, without any power to do so, but that the constituent afterward expressly ratified the act, the presumption will be that the ratification was in some legal and sufficient mode: *Racouillat v. Sansevain*, 32 Cal. 377.

The same presumptions are applicable to corporations as to private persons; hence, though the records of the defendant may have been an entire blank as to any corporate action of the board of directors respecting the employment of the plaintiffs, or services performed by them for the company, it does not follow that the board did not pass a vote authorizing the president to make the contract; for a vote of the board of directors may be presumed from its acts, though there is no proof of such vote on the corporate record: *Pixley v. Western Pacific R. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

**Agent's Authority, Presumption of Knowledge of.**

Section 2317 of the Civil Code, in regard to ostensible agency, does not apply to the case of a special agent whose powers are carefully defined by a written instrument, which the party dealing with the agent must be presumed to have seen and examined: *Quay v. Presidio etc. R. R. Co.*, 82 Cal. 1, 29 Pac. 925.

**Agent, Presumption on Purchase of Principal's Land by.**

It cannot be presumed, in the absence of proof, that an agent used his own funds in relation to the subject matter of the agency. If an agent, intrusted with a farm for sale, receives the proceeds of the produce of the farm, and redeems or purchases a lot of the principal, which was sold under foreclosure, with the proceeds of the sale of the farm, and also

with other funds not otherwise accounted for, it will be presumed that such other funds were the proceeds of the produce: *Mallagh v. Mallagh*, 77 Cal. 126, 19 Pac. 256.

The purchase by an attorney, with his client's consent, of the client's property, sold under various executions, by procuring assignments to himself of the certificates of sale and deeds thereunder, in the absence of any showing that it was made for the benefit of the client, or was in fraud of his other creditors, must be presumed to have been fair and regular as between the attorney and client, and not to have been in effect a redemption by the client, nor a fraud upon his creditors: *Fisher v. McInerney*, 137 Cal. 28, 35.

#### **Arbitrators Intend to Decide According to Law.**

If the arbitrators state the reasons of their award, it will be presumed they intended to decide according to law: *Muldrow v. Norris*, 2 Cal. 74, 6 Am. Dec. 313.

#### **Appearance, Presumption Arising from.**

If counsel appears to a motion, the presumption is that he appeared to oppose, and not to consent to the order sought by the motion: *Borkheim v. N. B. & M. Ins. Co.*, 38 Cal. 623.

#### **Assessment, Presumption in Favor of.**

The acts of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown: *Palmer v. Boling*, 8 Cal. 384.

When the assessment-book shows an assessment which on its face purports to be sufficient, it is incumbent on the defendant to introduce evidence of any facts that will defeat the regularity or sufficiency of the assessment; and, if no such evidence is introduced, judgment should be rendered for the recovery of the tax: *San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66.

Where record discloses conflict of testimony, and that there was some testimony showing that the assessor had done everything necessary to make a valid

assessment, such an assessment will not be held fatally defective on appeal: *People v. Empire Gold etc. Min. Co.*, 33 Cal. 171.

**Assessment, Regularity of, Presumption of.**

In the absence of evidence to the contrary, it will be presumed that the commissioners, in viewing the land and making the assessment, conformed to the requirements of section 3456 of the Political Code: *Swamp Land Reclamation District No. 407 v. Wilcox*, 75 Cal. 443, 17 Pac. 241.

**Attorney's Authority, Presumption in Favor of.**

The authority of an attorney at law to appear for parties for whom he enters an appearance in an action will be presumed when nothing to the contrary appears: *Hayes v. Shattuck*, 21 Cal. 51.

The presumption is that the attorney who enters the appearance of a defendant, without service of process, was authorized to do so, and one who seeks relief in equity from a judgment rendered against him, on an appearance entered by an attorney, must make out a clear case of want of authority in the attorney, and must show clear merits, and take prompt action: *Garrison v. McGowan*, 48 Cal. 592.

If an agent of an absent defendant has been in the habit of employing an attorney at law for the absent defendant, and has paid him for services out of the funds of such defendant, and such defendant was in the habit of leaving the conduct of his suits with such agent, the presumption is that an appearance entered by such attorney for said defendant was by authority: *Garrison v. McGowan*, 48 Cal. 592.

Appearance in court of attorney is prima facie evidence of his authority to act, and, in order to show want of authority upon the part of the attorney, the litigant must present clear and convincing evidence: *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51.

Attorney's license is prima facie evidence of his authority to appear for any person whom he professes to represent: *People v. Mariposa Co.*, 39 Cal. 683.

Attorney may be compelled to show his authority to appear, either at the instance of the party for whom he appears or of the opposite party: *People v. Mariposa Co.*, 39 Cal. 683.

The affidavit of an attorney which states that he is informed and believes that the attorney who represents the opposite party is not authorized to appear, is sufficient to show the want of authority in the attorney: *People v. Mariposa Co.*, 39 Cal. 683.

The authority of an attorney who appears will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the attorney. Nor will such action be reviewed on the ground of mistake, unless the mistake be unmixed with any fault or negligence of either the party or his attorney: *Holmes v. Rogers*, 13 Cal. 191, *Distinguished* 50 Cal. 43, 19 Am. Dec. 649.

An attorney of the court who institutes suit in the name of a plaintiff is presumed *prima facie* to have authority, and the adverse party or his attorney cannot, upon mere suggestion at the bar, deny the right of a party to appear by the attorney of record, nor deny that the attorney so appearing has full authority to prosecute the suit: *Turner v. Caruthers*, 17 Cal. 431.

An action regularly instituted by an attorney is presumed to be with the consent of the plaintiff; and, until his want of authority is established, the defendant cannot have the action dismissed by showing that the plaintiff does not desire to maintain it, the attorney opposing the dismissal: *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

#### **Attorney, Presumption in Favor of on Proceeding for Disbarment.**

In a proceeding to disbar several attorneys comprising a firm, which is quasi criminal in its nature, the respondents are entitled to the benefit not only of the presumption, but of such proof as is made, of good character and reputation in the consideration of the testimony tending to create or leave a doubt as



to the fact or intent of their acts: *Matter of Luce*, 83 Cal. 303, 23 Pac. 350.

**Attorney's Compromise, Presumption of Consent to.**

Though it may be presumed that an attorney acted with the consent of his client in compromising an action, if nothing appears to the contrary, yet his general retainer as attorney does not give him the power to compromise the rights of his client, and he has no power to make a compromise against or without the consent of his client if that want of consent is known to the opposite party: *Trope v. Kerns*, 83 Cal. 553, 23 Pac. 691.

**Attorney and Client, Communications Between, Presumed Confidential.**

Presumption is that all communications between attorney and client are confidential, but this presumption may be rebutted: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

**Authority of City Attorney to Commence Proceedings, Presumption of.**

Where the condemnation proceedings were commenced by the city attorney and special counsel for the city, their authority therefor will be presumed, and proof that the city trustees directed the commencement of the proceeding is not necessary, unless their authority is directly attacked: *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

**Bankruptcy, Presumption as to Preference by Debtor.**

Where the transfer by an insolvent debtor to a creditor is not made in the usual and ordinary mode of business, the transaction is presumed, *prima facie*, to be a preference, not allowed by section 55 of the Insolvent Act; but such presumption may be overcome by counter-evidence, showing that no preference of the creditor over other creditors was intended, but that the insolvent intended *bona fide* to treat all of his creditors alike: *Haas v. Whittier*, 97 Cal. 411, 32 Pac. 449.

**Ballots, Presumption that Ballots Have not Been Mutilated.**

The presumption of law is that the ballots are all returned to the county clerk, and that they have not been mutilated, and if such is not the case it should be shown by evidence: *People ex rel. Budd v. Holden*, 28 Cal. 123.

**Bills and Notes, Presumption of Payment.**

Possession of a promissory note by the payee raises a presumption of nonpayment. And possession by the maker raises a presumption of payment. Hence if the allegation of nonpayment be denied, it is incumbent upon the plaintiff to prove nonpayment, at least by producing the note or accounting for its non-production: *Turner v. Turner*, 79 Cal. 565, 566.

The disputable presumptions that an obligation delivered up to a debtor has been paid and that the ordinary course of business has been followed, do not raise a conflict in the evidence, where the fact is proven contrary to the presumptions by evidence without conflict, but in such case the presumption is simply overcome and dispelled; and such presumptions are allowed to stand as evidence, not against the facts they represent, but in lieu of proof of them: *Savings & L. Soc. v. Burnett*, 106 Cal. 514, 529.

It must be presumed that if the note had been paid, it would have been delivered up, and it being found at the death of the decedent in possession of the plaintiff, it must be presumed that it had not been paid by the decedent: *Griffith v. Lewin*, 125 Cal. 618, 621.

**Bona Fide Holders, Presumptions as to.**

The presumption is that the indorsee of a promissory note is a holder for value, and the burden of proof is on the party denying that it is so held: *Poorman v. Mills*, 35 Cal. 118, 95 Am. Dec. 90.

The general rule is that the holder of negotiable paper is presumed to have taken it for value, and before its dishonor, and in the regular course of business, and the burden of proof to overthrow these pre-

sumptions lies on the maker: *Sperry v. Spaulding*, 45 Cal. 544.

In the absence of evidence on the subject, the presumption is that the note was indorsed for a valuable consideration before maturity: *Luning v. Wise*, 64 Cal. 410, 1 Pac. 495, 874.

The holder of negotiable paper indorsed before maturity, is supposed to be the bona fide owner of the same, and all intendments are in favor of his right: *Palmer v. Goodwin*, 5 Cal. 458.

Presumption of the law is in favor of a holder before maturity, to rebut which it is necessary to show by competent testimony that he is not the bona fide holder, or that the note was not indorsed until after maturity, or some other fact from which the law will imply a fraud: *Palmer v. Goodwin*, 5 Cal. 458.

#### **Business, Presumed Course of Business Followed.**

In the absence of proof to the contrary, it is presumed that in dealing with a mortgage, a bank as mortgagee has followed the regular course of business in every detail for or against itself: *Glide v. Dwyer*, 83 Cal. 477, 483.

It is to be presumed that an assignment made by a Minnesota corporation for the benefit of its creditors to an assignee residing in Illinois, where the corporation was doing business, and made in conformity with the laws of Illinois, and conducted by the assignee under the direction of a court in that state, was made in Illinois, and is valid in all respects, and that the law has been obeyed and the ordinary course of business pursued by the assignee: *Fenton v. Edwards & Johnson*, 126 Cal. 43, 49.

#### **Business, Presumption that Every Man Knows Condition of His Own.**

The presumptions that every man knows the condition of his own business, and that every man intends the consequences of his acts, are disputable, and an inference of the fact of fraudulent intent from a deed of gift by an insolvent debtor to his wife, which might rest upon those presumptions, is overcome by

a finding that he was ignorant of the fact of his insolvency: *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873.

**Carriers, Presumption Against.**

The presumption of law is against common carrier, except it be made to appear that the injury complained of could not have happened by the intervention of human means: *Agnew v. Steamer Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87.

**Check, Presumption Arising from.**

Legal presumption is that check is drawn for money due from the drawer: *Headley v. Reed*, 2 Cal. 322.

**Children, Presumption as to Competency to Testify.**

If over fourteen years of age, the presumption is that children possess the requisite knowledge and understanding to be witnesses; but if under that age, the presumption is otherwise, and it must be removed from their examination by the court or under its direction, and in its presence, before they can be sworn: *People v. Bernal*, 10 Cal. 66.

**Conclusive Knowledge of State of One's Own Title.**

Person is conclusively presumed to know state of his own title to real property in dealing with a stranger. No misrepresentation, therefore, by the latter on this subject can have the effect of misleading: *Robins v. Hope*, 57 Cal. 493.

**Common Property, Presumptions as to Existence of.**

In the absence of an allegation that there is common property, the presumption would be that there was none: *Kashaw v. Kashaw*, 3 Cal. 312.

**Commission, Presumption that Directed to Properly Qualified Officer.**

The presumption is that on granting the commission the judge who ordered it performed his duty, and directed it to a person who was qualified to execute it: *Dambmann v. White*, 48 Cal. 439.

**Commitment, Presumption of Regularity of.**

The defendant in the court below moved to set aside the information, on the ground that before the filing thereof, the defendant had not been legally committed by a magistrate. The commitment was indorsed on the complaint. There was no other deposition in writing. Held, we must presume that the examination was had before the justice, in accordance with the rule that public officers must be presumed to have performed their duty, as required by law, until the contrary appears. There being no deposition in writing, there was no fault or irregularity in making and indorsing the order on the complaint, as was done in this case: *People v. Smith*, 59 Cal. 365; *People v. Hope*, 62 Cal. 291.

**Consideration is Presumed to be Fair.**

In a contract for the sale of lands, the consideration named in the instrument will be presumed to be fair and adequate, in the absence of evidence to the contrary: *Hall v. Rice*, 64 Cal. 443, 1 Pac. 891.

**Consideration, Presumption that Consideration of Deed was Paid by Grantee.**

The presumption is that the consideration of a deed of conveyance was paid by the grantee named in the deed. This presumption, and the express declarations of the deed in that respect, may be overcome by parol proof, but to have that effect the evidence must be full, clear and satisfactory: *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889.

**Consideration, Presumption of for Check.**

With check, the presumption is that it is given upon valid consideration, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration: *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746.

**Consideration, Presumption of from Writing.**

Written contract of employment is presumptive evidence of consideration, and raises a presumption that

the defendant, as principal, had agreed to pay the plaintiff, as his agent, or broker, a consideration for services rendered under the contract: *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130.

The law presumes that when the bank received the assignment, it paid a consideration therefor: *Glide v. Dwyer*, 83 Cal. 477, 483.

**Consideration—Presumption Rebuttable.**

When want of consideration of a stay bond is pleaded there can be no estoppel of the sureties that can interfere with that defense. The presumption of consideration attaching to a written instrument is a disputable presumption, which may be overcome by evidence of facts showing a want of consideration: *Estate of Kennedy*, 129 Cal. 384, 389.

**Contract, Presumption of Meaning of Words Used in Contract.**

Where it is apparent that the parties to a written contract have attached to certain words or expressions a particular meaning in one part of a contract, it must be presumed, nothing appearing to the contrary, that the same meaning was intended wherever like words or expressions are subsequently used: *Saunders v. Clark*, 29 Cal. 299.

**Contract, Presumption that Writing Contained Entire Contract.**

If there is no uncertainty in the object and meaning of a contract it is presumed that it contained the entire contract between the parties: *San Jose Sav. Bank v. Stone*, 59 Cal. 183, 187.

**Contract, Presumption of Validity of Contract by Corporation.**

A loan of money upon mortgage security by corporation organized for the purpose of constructing ditches for the conveyance and sale of water is not necessarily an act exceeding its corporate powers. Such contract, if necessary to attain its general objects, and made as an incident to the exercise of its granted powers,

is valid. In the absence of proof, its validity will be presumed: *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

**Constitutionality of Law, Presumption in Favor of.**

The presumption which attends every act of the legislature is that it is within its power; and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body: *Matter of Bonds of Madera Irr. Dist.* 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675.

The act of the legislature of March 31, 1891, appropriating money to pay James W. Rankin for services rendered the state, under appointment by the governor, not being void on its face, must be presumed in payment of a legal and just claim, and the court will not look into evidence aliunde to determine whether it awards extra compensation to an officer after the service has been rendered, or constitutes a gift in violation of the provisions of the constitution: *Rankin v. Colgan*, 92 Cal. 605, 28 Pac. 673.

**Corporation, Presumption that Corporation was Organized for Profit.**

It is not a presumption of law that a corporation organized for irrigating purposes was organized for profit: *Applegarth v. McQuiddy*, 77 Cal. 408, 19 Pac. 692.

**Corporate Existence, Presumption of.**

Proof of the company name raises no presumption that it is an incorporated company; nor if the word "California" occurs in the name does it raise a presumption that it was incorporated under the laws of this state: *Briggs v. McCullough*, 36 Cal. 542.

**Cancellation of Stock, Presumption from.**

The inference from the cancellation of certificate of stock on a certain day is not that the original

owner held them until that day, but that he may have assigned them at some uncertain date prior to their cancellation: *Graves v. Mono Lake Hydraulic Min. Co.*, 81 Cal. 303, 22 Pac. 665.

**Corporation, Presumption that Officer Knows Its Usage.**

If such usage existed, plaintiff's position as a member and officer of the corporation is sufficient *prima facie* to charge him with a knowledge of its existence; and the inference would be that he accepted the office and performed its duties without expecting compensation: *Fraylor v. Sonora Min. Co.*, 17 Cal. 594.

**Corporation, Presumption of Right of to Hold Real Estate.**

Indebtedness is not fictitious in any sense of the word, where it consists of notes and mortgages, executed by the corporation in consideration of money advanced to and paid for the corporation, and property sold and delivered to it by the mortgagee, though but a part of the consideration for each note had been received by the corporation at the date of the note, if the full consideration of the notes was afterward received by the corporation, and that there was no fraud upon the part of the mortgagee: *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300, 28 Pac. 1049.

**Damages Presumed from Trespass.**

In suit for damages for an entry upon mining claims, and for perpetual injunction, etc., held, that it was error for the court below to charge the jury that if they believed no injury or damage was done by defendants to plaintiffs, they would find for defendants; that such charge was calculated to mislead, inasmuch as the law presumes damages from a trespass, and under the charge the jury might have decided the case upon his want of proof of plaintiffs' damages, instead of absence of proof of their title: *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.



**Damages, Presumptions as to.**

The expression of section 3336 of the Civil Code, "the detriment caused by the wrongful conversion of personal property is presumed to be," indicates that it was intended to establish a legal presumption to operate, and which could only operate, at the trial of the cause: *Tulley v. Tranor*, 53 Cal. 274.

**Demurrer, Presumption as to Action Taken.**

If a demurrer to the complaint was filed, and a judgment by default was entered, and the appeal rested on the judgment-roll, and the same did not disclose what action was taken on the demurrer, the presumption was that the demurrer was disposed of, and that the necessary preliminary steps were taken to obtain judgment: *Abadie v. Carrillo*, 32 Cal. 172.

**Death, Presumption from Seven Years' Absence.**

In the absence of affirmative evidence the dissolution of the marriage is not to be presumed to have occurred, either by divorce or by the death of one of the parties to it. In the latter case the presumption of death is created by evidence that a party to the marriage has not been heard from in seven years. There is no presumption of law that life will not continue for any period, however long. But juries are justified in presuming as a fact that a person is dead who has not been heard of for seven years. Under our code, the jury is bound to presume that a person not heard from in seven years is dead. But this presumption is disputable, and may, in its turn, like the presumption of continued life, be overcome by other evidence: *People v. Stokes*, 71 Cal. 263, 267.

A person not heard from in seven years is presumed dead. It is uniformly held that the presumption of death does not arise under that provision until the expiration of the time stated, "unless," as was said in *Burr v. Sim*, 4 Whart. 150, "there are circumstances in evidence to quicken time." As to what circumstances will "quicken the time" so as to raise the presumption of death before the expiration of the statutory period, no specific statement can be made that will apply to all cases. The presumption of the continuance of life

may cease within the statutory period in the absence of direct proof of the fact of death, and therefore the presumption may be rebutted by any circumstance or combination of circumstances that may render death more probable than the continuance of life: *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 289.

**Default, Presumption of Entry of.**

If the entry of a default is essential to the validity of a judgment by default it will be presumed that one was taken, unless the contrary appears: *Miller v. Miller*, 33 Cal. 353.

**Defalcation, Presumption as to Time of.**

Under the provisions of the County Government Act and Political Code, if the same person is both treasurer and tax collector, and he settles his accounts as tax collector with the auditor, and receives a certificate stating the amount due from him as tax collector which certificate is afterward found in the treasury, the presumption is that the money was deposited in the treasury with the certificate, and, in the absence of evidence as to when a defalcation occurred, that it occurred after the money was so deposited; and the sureties of the treasurer are liable: *Butte County v. Morgan*, 76 Cal. 1, 18 Pac. 115.

**Delivery, Presumption of from Execution of Deed.**

No legal presumption of the delivery of a deed arises from the signing and acknowledgment. The party claiming under it must prove its delivery: *Boyd v. Slayback*, 63 Cal. 493.

**Delivery of Deed, Presumption as to Date of.**

The presumption is that a deed was delivered on the day given in the body of the deed, but such presumption is not conclusive, and the true date of delivery may be proved aliunde: *Treadwell v. Reynolds*, 47 Cal. 171.

**Deed, Presumption that Deed Contained Premises Demanded in Ejectment.**

In ejectment to recover lot number five, in the square bounded by L and M and Fourth and Fifth

streets, in the city of Sacramento, if the plaintiff offers in evidence a deed conveying the south half of sixteen blocks, between Fourth and Eighth and M and I streets, in the city of Sacramento, excepting lots six and eight, between Fourth and Fifth streets and J and K streets, and lots five and eight, between Fourth and Fifth and K and L streets, and lot eight, between Fourth and Fifth and L and M streets, and lots seven and eight, between Fourth and Fifth and I and J streets—the lots conveyed being fifty-eight in number—there is enough on the face of the deed to raise the presumption that it includes the lot sued for without other evidence: *Sanchez v. Neary*, 41 Cal. 485.

#### **Deed, Absolute, Presumption as to.**

In an action in which it is charged that a deed absolute in form was intended as a mortgage the presumption of law, independent of proof, is, that the instrument is what on its face it purports to be—an absolute conveyance; and this presumption should be allowed to prevail in the mind of the trial judge, unless the evidence offered to show that the deed was in fact intended as a mortgage is entirely plain and convincing, and presents a case free from doubt: *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957; *Penney v. Simmons*, 99 Cal. 380, 33 Pac. 1121.

#### **Diligence, Presumption Against.**

In the absence of a showing to the contrary, it must be presumed that the steps taken to ascertain the defendant's residence were carried on about the date of the successful search made in the recorder's office: *Diggins v. Thornton*, 96 Cal. 417, 31 Pac. 289.

#### **Dishonor, Presumption of.**

A promissory note payable on demand, a bank check, or certificate of deposit, are not presumptively dishonored until the lapse of a reasonable time after payment thereof may be legally demanded: *Himmelman v. Hotaling*, 40 Cal. 111, 6 Am. Rep. 600. '

A sight bill or note, payable on demand, is presumed to be dishonored after a reasonable time shall

have elapsed after its date: *Poorman v. Mills & Co.*, 39 Cal. 345, 2 Am. Rep. 451.

What such reasonable time is depends upon circumstances of each case, and is a question of law to be determined by the court: *Poorman v. Mills*, 39 Cal. 345, 2 Am. Rep. 451; *Himmelman v. Hotaling*, 40 Cal. 111, 6 Am. Rep. 600.

**Easement, Presumption of Grant of from User.**

The presumption of grant of easement, when indulged against proper party, is because his conduct, in submitting to the use for such a length of time without objection, cannot be accounted for upon any other hypothesis: *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299.

**Erasures, Presumptions as to Time of Making.**

When a printed form of a promissory note is used, and an erasure is made only as to the printed matter, the presumption is that it was made prior to the execution of the note and to suit the terms agreed on by the parties: *Corcoran v. Doll*, 32 Cal. 82.

**Execution Sale, Presumption of Receipt of Excess by Debtor on not Presumed.**

The receipt by an execution debtor of the excess of the proceeds arising from an execution sale will not be presumed: *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67.

**Excusing Grand Juror, Presumption in Favor of.**

Where, on motion to set aside an indictment for alleged errors committed in impaneling the grand jury by which the indictment was found, it was shown only that certain persons who had been drawn as such jurors were excused by the court, the cause therefor not appearing, held, that it will be presumed, in the absence of a showing to the contrary, that the court did not excuse said persons without legal cause: *People v. Millsaps*, 35 Cal. 47.

**Executrix, Presumption as to Receipt of Assets by.**

An executrix having lawful authority to receive the rents and profits of lands devised in her official ca-

capacity, and no authority appearing to receive them in any other capacity, must be presumed to have received the same as assets of the estate, though it is not found that she received them as executrix. Findings of probative facts showing that she did not treat them as assets of the estate in the course of administration do not show that they were not received by her as executrix: *Washington v. Black*, 83 Cal. 290, 23 Pac. 300.

**Executors, Residence of, Presumption as to.**

If one only of two or more executors named in a will petitions for its admission to probate, and no citation is served on the others named as executors, and it does not appear that such others are residents of the county where the petition is filed and therefore are required to be cited, it will not be assumed, for the purpose of invalidating the proceedings admitting the will to probate, that such others were residents of the county where the petition was filed: *McCrea v. Haraszthy*, 51 Cal. 146.

**Executors, Presumption of Regularity of Order Accepting Resignation of.**

If the administrator or executor of an estate resigns his trust, and an order is made by the probate court accepting the resignation, and the resignation and order of acceptance are in proper form, when the proceeding is collaterally questioned in another court the presumption is, that the order accepting the resignation was properly made, and that the executor or administrator had settled his accounts and delivered up all the estate to some person appointed by the court: *Lucas v. Todd*, 28 Cal. 182.

An order of the probate court accepting the resignation of an executor, and discharging him from his trust, is presumed to be regular, and cannot be collaterally attacked: *Luco v. Commercial Bank of San Diego*, 70 Cal. 339, 11 Pac. 650.

**Existence Presumed to Continue.**

A status once established is presumed by the law to remain, until the contrary appears, or as a like rule

is expressed in the Code of Civil Procedure, "that a thing once proved to exist continues as long as is usual with things of that nature": *Kidder v. Stevens*, 60 Cal. 414, 419.

Evidence that there were no indications of a channel at a certain date would perhaps tend to prove that there was no channel at a previous date. But—unless we can say as law that the channel could not have gone out of existence—such evidence would not establish conclusively that the channel never existed. Nor would it create the disputable presumption that "a thing once proved to exist continues as long as is usual with things of that nature." The presumption that a thing existing in the present existed at any time in the past—if it could be considered to be a presumption—would be the reverse of the code presumption: *Lux v. Haggin*, 69 Cal. 254, 418.

It is undoubtedly true that a rule of law once established, is presumed to continue in force until repealed or changed: *White v. Douglass*, 71 Cal. 115, 121.

It having been conclusively shown that deceased owned separate property at the time of his marriage, it continued to remain such, and the profits thereof acquired the same character: *In re Bauer*, 79 Cal. 304, 310.

It does not follow because a man is insolvent on one day that he was insolvent at any subsequent or antecedent period. The true rule, and the one established by the code, is, that the presumption is that "a thing once proved to exist continues as long as is usual with things of that nature": *Scott v. Wood*, 81 Cal. 398, 405.

Where it is shown that the minds of the parties had met and agreed upon what was to be done when the time came to act in executing the declarations of trust, in the absence of proof to the contrary the law presumes that they remained in the same condition of agreement until the act was done: *Ward v. Waterman*, 85 Cal. 488, 502.

To sustain this action (claim and delivery) plaintiff must have the right to immediate and exclusive

possession at the time of the commencement of his suit. It is a cardinal principle in pleading that ultimate and not probative facts are to be pleaded. The ultimate fact in such an action is, that plaintiff was at the time the action was commenced the owner of, or had some special property in the chattel, coupled with a right to the immediate possession thereof. The fact that he was the owner and entitled to the possession at a previous date is evidence from which the ultimate fact may be deduced, upon the principle that "a thing once proved to exist continues as long as is usual with things of that nature": *Fredericks v. Tracy*, 98 Cal. 658, 660.

It thus having been established that the appeal is pending, it will be presumed to be still pending until the presumption is legally overcome: *People v. Durrant*, 119 Cal. 54, 56.

The office of assignee once created cannot be presumed to exist in the face of an appointment subsequently made by the same court which the record declares was "duly and regularly made," and nothing appearing to contradict the finding: *Freemen v. Spencer*, 128 Cal. 394, 398.

If the plaintiff's grantors were owners of the land in September, 1883, it is to be presumed—in the absence of anything appearing to the contrary—that they continued to be such to the date of the deed, February 11, 1884; and also to the time the ditch was constructed in the same year: *Hohenshell v. South Riverside etc.. Co.*, 128 Cal. 627, 631.

### **Fraud, Presumptions Against.**

If such a state of facts is presented as leaves a reasonable presumption of mistake or misapprehension on the part of the person swearing to the proofs of loss, such presumption should be indulged in preference to that willful false swearing: *West Coast Lumber Co. v. State Investment etc. Co.*, 98 Cal. 502, 33 Pac. 258.

### **Fraud from Want of Change of Possession.**

A transfer of personal property, not accompanied by an immediate delivery, and an actual and con-

tinued change of possession, is conclusively presumed to be fraudulent, and therefore void, as against the creditors of the vendor: *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167.

Every transfer of personalty made by one who has such property in possession is conclusively presumed to be fraudulent as against those who are his creditors while he has such possession, and against any person on whom his estate devolves in trust for the benefit of others than the one who made such transfer, unless such transfer is accompanied by an immediate delivery, and is followed by actual change of possession: *Harris v. Harris*, 59 Cal. 623, 625.

Where it appears that the lessee in whose name the insurance policy was taken had surrendered the lease to the lessor as security for the payment of back rent, he still had an equitable interest in the property, and, subject to the payment of the back rent, was entitled to be restored to his legal status under the lease, and it will not be presumed that he intended willfully to swear falsely in stating in the proofs of loss that he alone owned the insured building, which he had erected as lessee, because of the fact that the legal title had passed from him to the lessor: *West Coast Lumber Co. v. State Investment etc. Co.*, 98 Cal. 502, 33 Pac. 258.

#### **Fraud Never Presumed.**

Fraud cannot be presumed, and the burden of proof is upon him who alleges it: *Gray v. Galpin*, 98 Cal. 633, 33 Pac. 725.

One relying upon fraud must establish it. It will never be presumed: *Nathan v. Doane*, 55 Cal. 343; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.

It was also alleged in the defendant's answer that the conveyance "was made and accepted in good faith . . . . and solely and only for the purpose of securing" the payment of his debt; and this must be presumed to have been the case: *White v. Wise*, 134 Cal. 613, 615.

#### **Gift, Presumption of on Deed from Husband to Wife.**

When a husband makes a deed of community prop-



erty to his wife, to have and to hold to her separate use, the prima facie presumption arising from the deed is that it was intended to change the character of the property from community property to the separate property of the wife, and a subsequent sale by the husband to a third person cannot rebut his presumption. The deed to the wife is effectual as against a subsequent purchaser from the husband: *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869.

**Grand Jurors, Presumptions in Favor of Acts of.**

Presumptions are in favor of regularity of the proceedings of the grand jury: *People v. Mills*, 17 Cal. 276. Cited 4 Utah, 125.

**Guest, One Going to Inn Presumed to be.**

Party who goes to a public inn will be presumed to go as guest, and not as a boarder: *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943.

**Guilt, Presumption of on Application to Reduce Bail.**

Upon an application to reduce bail after an indictment the guilt of the prisoner is presumed: *Ex parte Duncan*, 54 Cal. 75.

In proceedings on habeas corpus where the petitioner has been indicted his guilt will be assumed upon an application for reduction of bail: *Ex parte Duncan*, 53 Cal. 410.

If a party be committed for an alleged offense, and an indictment be found against him by grand jury in a proceeding as to increasing or diminishing his bail, he will be assumed to be guilty: *Ex parte Ryan*, 44 Cal. 555.

**Guilt, Presumption as to Degree of.**

On trial for murder it is error for the court to instruct the jury, that from the mere fact of killing the law presumes the slayer guilty of murder in the first degree, unless this presumption is rebutted by the evidence: *People v. Gibson*, 17 Cal. 283.

The court on a trial for murder should not charge the jury that, the killing being proved, the law im-

plies that it was willful, deliberate, and premeditated, and the defendant is guilty of murder in the first degree, and thus ignore any evidence tending to show mitigating or extenuating circumstances, or to show that the homicide was justifiable or excusable: *People v. Woody*, 45 Cal. 289.

**Grant, Presumption of, from Possession.**

It is not province of jury to determine whether a grant could fairly be presumed from a possession of a certain character: *Castro v. Gill*, 5 Cal. 40.

**Heir, Presumption of Existence of.**

The codes of this state, like all other laws, proceed upon the theory that things have happened according to the ordinary course of nature and the ordinary habits of life; and it is a presumption of law that every intestate has left some one on earth entitled to claim as his heir, however remote. In every provision of our codes relating to the administration of estate and germane to the subject, this presumption is indulged. These provisions are numerous, and it is unnecessary to copy them here: *People v. Roach*, 76 Cal. 294, 297.

**Incompetent, Vendor is not Presumed to be.**

A witness will not be presumed to be interested because he is shown to have executed a deed to the party calling him of the land in controversy, where the deed itself is not produced, and no proof is made as to the covenants which it contained. The court will not presume that the deed contained covenants of warranty: *Wright v. Carillo*, 22 Cal. 595.

**Indictment, Decision on Motion to Set Aside, Presumption in Favor of.**

The decision of the trial court upon a motion by the defendant to set aside the information for embezzlement, that the depositions taken at the examination of the defendant upon the charge of grand larceny justify an information for embezzlement, will, in the absence of a showing to the contrary, be presumed to be correct, and not in excess of its jurisdiction: *Ex parte Nicholas*, 91 Cal. 640, 28 Pac. 47.

**Indictment, Presumption in Favor of.**

It will be presumed that an indictment was presented to the court by the foreman of the grand jury, and in their presence, although that fact is not indorsed on it, if the record of the court shows nothing to the contrary: *People v. Blackwell*, 27 Cal. 65.

Where the order committing the defendant to answer is filed on the same day with the filing of the information, it will be presumed in favor of the regularity of the proceedings, there being no showing to the contrary, that the information was filed subsequent to the commitment: *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

**Innocence, Presumption of.**

If two persons be jointly or severally indicted for the same offense, the conviction of one does not raise the presumption that the other is innocent: *People v. Johnson*, 47 Cal. 122.

An instruction to a jury in a criminal action, to the effect that the defendant is presumed to be innocent until proven guilty, and that the presumption goes with him all through the case, "until it is submitted to you," is erroneous as to the latter part, and should not have been given. The presumption of innocence does not cease upon submission of the cause to the jury, but operates until they have arrived at a verdict: *People v. McNamara*, 94 Cal. 509, 29 Pac. 953.

It is not necessary that the evidence for the prosecution in a criminal case should show that the innocence of the defendant is impossible in order to justify the jury in finding him guilty, but it is enough if such evidence demonstrate the guilt of the defendant beyond a reasonable doubt: *People v. Brotherton*, 47 Cal. 388.

In a criminal case, the jury cannot convict the defendant merely because they believe the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance; but the jury should be fully convinced of the correctness of their

conclusion that the defendant is guilty: *People v. Ah Sing*, 51 Cal. 372. Cited 87 Cal. 121, 25 Pac. 265.

The jury have right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man, in weighing the evidence to determine whether there is a reasonable doubt as to the defendant's guilt: *People v. Travers*, 88 Cal. 233, 26 Pac. 88.

A reasonable doubt of the guilt of a person on trial for a criminal offense is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it: *People v. Ashe*, 44 Cal. 288.

It is not sufficient to raise a doubt, even though it be a reasonable doubt of the fact of extenuation, simply because it is no proof of the fact: *People v. Milgate*, 5 Cal. 127.

If a person is killed by a bullet fired from a pistol, and two persons each at the same time fire loaded pistols at him, and one of the persons who fired is on trial for murder, and there is no evidence of a conspiracy between the two persons who fired, and the jury are in doubt as to which shot killed the deceased, the defendant is entitled to the benefit of that doubt: *People v. Woody*, 45 Cal. 289.

Fact that Chinaman, who claims to have been robbed by white man, cannot be witness when the white man is on trial for the alleged robbery does not change the rules of evidence either as to the admission of testimony or as to the proof necessary to convict: *People v. Jones*, 31 Cal. 565.

The defendant in a criminal action is as much bound to produce testimony to rebut testimony for the prosecution which merely tends to prove his guilt as any other testimony introduced by the prosecution: *People v. Kelly*, 28 Cal. 423.

**Intent, that One Intends the Result of His Acts.**

Intent with which unlawful act was done must be proved; but when an unlawful act is proved to have been done by the accused, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant: *People v. Harris*, 29 Cal. 678.

The court instructed the jury that "intent, or intention, is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. The intent must be proved, but, when an unlawful act has been proved, the law presumes it to have been intended, and the proof of justification lies on the defendant"; and it was objected to this instruction "that it requires the defendant to prove his justification absolutely, whereas he is only obliged to prove his justification within, and not beyond, a reasonable doubt." Held, the instruction has no reference to the measure of proof required on behalf of the defendant, but simply states a well-settled principle of law: *People v. Hunt*, 59 Cal. 430.

The presumptions that every man knows the condition of his own business, and that every man intends the consequences of his acts, are disputable, and an inference of the fact of fraudulent intent from a deed of gift by an insolvent debtor to his wife, which might rest upon those presumptions, is overcome by a finding that he was ignorant of the fact of his insolvency: *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873.

**Intent and Malice, Presumptions as to.**

Intent to kill must exist, and this intent may be inferred from the circumstances, as the use of a weapon calculated to produce death: *People v. Bealoba*, 17 Cal. 389.

A charge that "when a person deliberately, premeditatedly, and unlawfully kills another, he is presumed to do so with express malice," is sufficiently favorable to the defendant: *People v. Cox*, 76 Cal. 281, 18 Pac. 332. Cited 81 Cal. 567, 22 Pac. 917.

In a prosecution for murder, when no considerable provocation for the killing appears, malice is implied:

People v. Knapp, 71 Cal. 1, 11 Pac. 793. Cited 96 Cal. 20, 30 Pac. 837.

**Insanity, Presumptions as to.**

Person is presumed to be sane until contrary is shown, and the burden is upon a defendant relying upon it as a defense to show his insanity by a preponderance of evidence: People v. Travers, 88 Cal. 233, 26 Pac. 88; People v. Myers, 20 Cal. 518; People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

It is only of habitual insanity, when proved once to have existed, that the law entertains the presumption that it continues, until the contrary is shown, otherwise of spasmodic or temporary mania: People v. Francis, 38 Cal. 183. Cited 57 Cal. 132.

On a criminal trial, where insanity is relied on as defense, it is proper to refuse to instruct the jury that if the defendant was insane a short time before the commission of the act, the presumption is that he was insane when he committed it: People v. Smith, 57 Cal. 130.

No presumption arises that a man is of unsound mind from the fact that he is a drunkard: Estate of Lang, 65 Cal. 19, 2 Pac. 491.

**Insolvency, Presumption of from Assignment.**

If a creditor were insolvent at the time of the assignment, the party contesting the validity of the assignment should affirmatively show such fact. The insolvency could not be presumed from the language of the assignment: Morgenthau v. Harris, 12 Cal. 245.

**Joint Tenancy, Presumption as to.**

The fact that two or more persons join in the execution of a mortgage of lands does not raise a presumption that the estate mortgaged is joint property: Bowen v. May, 12 Cal. 348.

**Judgments, Presumptions in Favor of.**

Every intendment is in favor of a judgment of a court of record, and, until the contrary be made clearly to appear, the appellate court is bound to sup-

pose that it was based on proper evidence: *Grewell v. Henderson*, 7 Cal. 290.

The judgment of a domestic court of general jurisdiction is conclusively presumed to be correct, and, when introduced in evidence in another proceeding, cannot be impeached, unless the record of the judgment shows that the court did not have jurisdiction of the subject matter of the action or of the person of the defendant: *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

The judgments of the late superior court of the city of San Francisco import the same absolute verity as those of the district courts: *Vassault v. Austin*, 36 Cal. 691.

In a collateral attack on a judgment of a court of superior jurisdiction, all intendments are indulged in its support, and whatever is upon its record is presumed to have been rightfully done: *Drake v. Duvenick*, 45 Cal. 455.

If it is admitted by the plaintiff on the trial that he has title under a patent issued for a Mexican grant within less than five years before the commencement of the action, and the defendant recovers judgment, and the plaintiff claims title by prescription, it will be presumed, in support of the judgment, that the grant was an imperfect one, and conveyed only an equitable title: *Wilkins v. McCue*, 46 Cal. 656.

Where a judgment divided land as between the parties by a line as laid down upon a certain map annexed to the judgment, and it was objected that the line was too vague and uncertain, and that the map furnished no data for its correct location, held, that all intendments were in favor of the judgment, and, in the absence of an affirmative showing to the contrary, it would be assumed that the line could be located with entire precision: *Thompson v. Connolly*, 42 Cal. 313.

If a judgment against an infant is offered in evidence, and the record shows service on the infant, but does not show with whom he was residing, it will be presumed, for the purpose of sustaining the jurisdiction, that he was residing with his father: *Brown v. Lawson*, 51 Cal. 615.

Jurisdiction will generally be presumed in the case of superior courts: *Forbes v. Hyde*, 31 Cal. 342.

If a judgment is rendered against a defendant by a court of general jurisdiction, it will be presumed that the court acquired jurisdiction of the person, unless the contrary appears affirmatively in the record: *Sharp v. Daugney*, 33 Cal. 505.

When the record of the superior court is silent as to jurisdictional facts, jurisdiction will be presumed; but if the judgment itself recites all the facts necessary to give jurisdiction, the matters thereby adjudicated are conclusive, and no evidence dehors the record can be received to impeach them: *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380.

When a judgment entered by default, upon a service of summons made by publication, recites that it was entered in pursuance of an order, the presumption is that it was entered in pursuance of an order of the court, and the judgment is not void on its face: *McCauley v. Fulton*, 44 Cal. 355.

When the summons is served after having been once returned, and the court thereupon assumes jurisdiction of the defendants, and renders judgment against them, it will be presumed in a collateral attack on the judgment that the court made the requisite order, permitting the summons to be withdrawn for further service: *Hancock v. Preuss*, 40 Cal. 572.

When the judgment-roll which is offered in evidence is silent as to the issuing and service of process it will be presumed that process was issued and served on the defendants, and the judgment is not void: *Mahoney v. Middleton*, 41 Cal. 41.

The presumption in favor of the judgment of a court of general jurisdiction is overthrown when the record of the entire case discloses a want of jurisdiction: *Gray v. Hawes*, 8 Cal. 562.

If the want of jurisdiction appears on the face of the record of the judgment of a superior court, the judgment is void, and it may be attacked in a collateral proceeding: *Forbes v. Hyde*, 31 Cal. 342.

The doctrine as to the presumptions indulged in favor of the jurisdiction and correctness of recitals



of judgments of courts of general jurisdiction applies only in cases where the attack is collateral, and not where the attack is direct: *McKinlay v. Tuttle*, 42 Cal. 571.

**Judgments, Presumption that Judgment as Entered was Authorized.**

The judgment need not be signed by the judge. The presumption is that the judgment as entered by the clerk was authorized: *California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59, 7 Pac. 123.

**Judgment, Presumed to Determine All the Issues.**

A judgment is conclusive upon all questions involved in the action and upon which it depends, and upon matters which, under the issues, might have been litigated and decided in the case; and the presumption of law is, that all such issues were actually heard and decided: *Parnell v. Hahn*, 61 Cal. 131, 132.

**Jurisdiction Over Insolvency Proceedings, Presumptions as to.**

It will be presumed in a collateral action, in which a proceeding in insolvency conducted to final judgment in a county court is relied on, that the county court had jurisdiction of the parties and subject matter upon production of the record of the proceeding alleging such jurisdiction, without other proof of the essential jurisdictional facts; and this because county courts are courts of record: *Barrett v. Carney*, 33 Cal. 530.

**Jurisdiction of County Courts and Court of Sessions, Presumption in Favor of.**

County courts are courts of general criminal jurisdiction, and as such all intendments are in favor of the regularity of their proceedings: *People v. Blackwell*, 27 Cal. 65.

The proceedings of courts of sessions are presumed to be regular and legal until the contrary be shown: *People v. Connor*, 17 Cal. 354.

Where the justices composing the court of sessions on a motion for a new trial were not the same as the

justices composing the bench during the trial, and the fact only appears by the minutes of the court, the rule that the same presumptions of regularity attach to the proceedings in courts of sessions as in district courts covers this case; and the presumption is that a sufficient reason existed for the change in the bench: *People v. Hobson*, 17 Cal. 424.

**Jurisdictional Facts, Presumption that Petition Contains.**

If a petition for the revocation of letters of administration does not show that the jurisdictional facts did not exist it will be presumed, for the purposes of the application, that they did exist: *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381.

**Jurisdiction, Presumption in Favor of.**

The rule is that the presumptions of law are in favor of the jurisdiction and of the regularity of the proceedings of courts of superior or general jurisdiction, which, in this state, comprise all courts of record, and this rule obtains equally, whether their proceedings be by the course of the common law or statute law, or be in the acquisition of jurisdiction of the person of defendant, by making either actual or constructive service of the summons on him; but that no such presumptions are indulged in favor of the jurisdiction or regularity of the proceedings of courts and tribunals of inferior or limited jurisdiction, which, in this state, comprises all courts not of record, and all special boards and tribunals which are created by law and clothed with judicial functions of a limited and special character; and all persons who claim any right or benefit under their judgments must show their jurisdiction affirmatively: *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

The rule by which inspection of the record is governed is, that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. In such case, it will be presumed that what ought to have been done was not only done, but rightly done; but where the record states what was done, it will not be presumed

that something different was done. A want of jurisdiction affirmatively appears on the face of the record, when whatever was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction: *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

Another rule is, that the whole record must be permitted to speak, as where that portion which is denominated the proof of service is not silent, but recites facts and acts done, as constituting the service made, and which, if the record were otherwise silent, would make it affirmatively show a want of jurisdiction of the person of defendant, yet, if, in another part, as the judgment, further facts or acts, not irreconcilable with the former, be recited, which establish such jurisdiction, it is sufficient to uphold the judgment: *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

It it does not appear affirmatively upon the face of a record of a court of general jurisdiction that the court had jurisdiction of the defendant, that fact will be presumed, unless the record shows affirmatively that no jurisdiction was acquired: *Carpentier v. City of Oakland*, 30 Cal. 439.

District courts are courts of general jurisdiction, and regularity of their proceedings is presumed. It rests with a party seeking to impeach them to show affirmatively the irregularity or acts or omissions which affect the validity of their judgments, especially after the jurisdiction of the person is once shown: *People v. Robinson*, 17 Cal. 363.

When record recites mode adopted to acquire jurisdiction over person in a probate proceeding, it will not be presumed something different was done: *Pearson v. Pearson*, 46 Cal. 609.

Although the exercise of jurisdiction is presumed rightful, yet if it appears from the records of the court in any matter that it had not acquired jurisdiction, either of the subject matter or of the parties, this presumption is destroyed. It cannot exercise jurisdiction until it has acquired it in the mode prescribed by statute: *Arroyo Ditch and Water Co. v.*

Superior Court, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54.

No question as to Judge Murphy's authority was raised at the time of entering the plea, and it must be presumed that he was lawfully exercising jurisdiction: *People v. Ah Le Doon*, 97 Cal. 171, 177.

Upon appeal from a judgment rendered in this state upon a deficiency judgment rendered in another state, where the record shows that the law of the other state was proved, but its tenor is not disclosed by the record, it cannot be presumed that the failure to make the grantee of the mortgagor a party to the foreclosure rendered the judgment void; but it must be presumed that the court properly considered the evidence, and correctly inferred therefrom that, under the proved law of the other state, the former judgment was rendered by the court in the due exercise of its jurisdiction: *Cummings v. O'Brien*, 122 Cal. 204, 206.

The court in the present case not only made the appointment and the appointee acted thereunder, but subsequently the court confirmed the sale made by the assignee, and, so far as the record shows, these proceedings were regular. It must be presumed that the court acted within its jurisdiction: *Freeman v. Spencer*, 128 Cal. 394, 398.

#### **Jurors, Presumption of Performance of Duty by.**

The presumption is that jurors perform their duty in accordance with the oath which they have taken, and to overthrow this presumption there must be some direct and positive testimony, tending to show misconduct on the part of the jury: *People v. Williams*, 24 Cal. 31

#### **Knowledge on Part of Subcontractor, Presumption as to.**

The lien which may be secured to subcontractors, laborers, and materialmen through the original contractor, by a compliance on their part with the provisions of the act of 1862 in relation to liens of mechanics and others (Stats. 1862, p. 384), must be determined and controlled by the terms of the original

contract between the owner of the property and the original contractor. Of the existence of such original contract and its terms, said lienholders are presumed to have notice, and to have taken subcontracts, contributed labor, and furnished materials in furtherance of the work in strict subordination to its terms: *Shaver v. Murdock*, 36 Cal. 293.

Knowledge, by a subcontractor upon a building, that there is an agreement in writing between the original contractor and the owner is sufficient to put him upon inquiry as to the contents of the writing, and charge him with notice thereof: *Bowen v. Aubrey*, 22 Cal. 556.

#### **Law, Presumed to be Obeyed.**

Under the provision in the act of 1878 (Stats. 1878, p. 949), providing that in case of negotiable warehouse receipts, goods can be delivered only upon presentation of the receipt, and indorsement thereon of the goods delivered, while in case of non-negotiable receipts the warehouseman may deliver goods upon the written order of the person holding the receipts, there can be no presumption that warehouse receipts are negotiable; but where an order is given upon the warehouseman by the owner of the receipts, the implication is that the receipts were non-negotiable: *Goldstone v. Merchants' etc. Co.*, 123 Cal. 625, 631.

#### **Legitimacy, Presumption as to.**

A child born in lawful wedlock is presumed to be the child of the husband. The marriage is an acknowledgment by the husband that the child is his; but, to be effective, there must be knowledge at the time of the fact admitted. Hence, where a man marries a woman with child, the law presumes the child is his; but this presumption is based upon the assumed fact that he knew, at the time of his marriage, the situation of the woman: *Baker v. Baker*, 13 Cal. 87.

Children born to a married woman during her coverture are presumed to be legitimate, and to be the issue of their mother's husband: *Estate of Romero*, 75 Cal. 379, 17 Pac. 434.

**Mail, Presumptions from Mailing of Letters.**

Where letters are proved to have been mailed by one of the defendants to another residing in a foreign jurisdiction, to which replies were received in due course of mail, it must be presumed that the letters mailed were received in the regular course of mail, and a letter beyond the territory of the state is within the meaning of the statute "lost," so as to allow secondary proof of its contents": *Zellerbach v. Allenberg*, 99 Cal. 57, 73.

When a telegram has been sent, it is a presumption of fact that it was received by the person to whom it was sent, and the fact that it was sent is admissible evidence tending to show that it was received; but its receipt may be disproved: *Eppinger v. Scott*, 112 Cal. 369, 371.

The letter having been properly addressed and mailed to him, it is presumed that he received it: *Pacific Press Co. v. Loofbourow*, 129 Cal. 20, 24.

The mailing of a letter by the taxpayer to the assessor, inclosing a statement of property for taxation, does not relieve him of the neglect to furnish a statement to the assessor, where the presumption that the letter was received in due course of mail is overcome by the testimony of the assessor that the letter and statement were never received: *Grade v. County of Mariposa*, 132 Cal. 75, 76.

**Malice, Presumptions as to.**

An instruction to the effect that when killing is shown to be without extenuating circumstances, malice is presumed proper: *People v. Hamblin*, 68 Cal. 101, 8 Pac. 687.

If publication is libelous, and not privileged, law implies that it was malicious, and this presumption of law that it was malicious is one that cannot be rebutted by evidence: *Lick v. Owen*, 47 Cal. 252.

Although a defendant charged with libel may show in mitigation, by his own testimony, that he was not actuated by ill-will or a feeling of personal spite, yet such evidence is not sufficient to disprove that malice which constitutes a necessary ingredient of the cause

of action, and which the law implies from the falsity of the libelous publication: *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157.

From want of probable cause, malice may be inferred; but from the most express malice want of probable cause cannot be implied: *Grant v. Moore*, 29 Cal. 644.

Malice cannot be presumed in prosecution where defendant has incurred all moral guilt of the charge, although he may have evaded the penalty of the law: *Sears v. Hathaway*, 12 Cal. 277.

#### **Malice, Presumption from Unlawful Act.**

Malice aforethought is not an essential element in the crime of mayhem, and proof of premeditation or deliberation is not required; but it is sufficient to prove the commission of the act, from which the law will presume, though it be done in pursuance of an intent formed during the conflict, that it was done unlawfully and maliciously, unless the evidence tends to show that it was done under circumstances constituting self-defense: *People v. Wright*, 93 Cal. 564, 29 Pac. 240.

An unlawful act is presumed to have been done with unlawful intent: Code Civ. Proc., sec. 1963, subd. 2. But such intent may be controverted by other evidence; and in a case of this sort, as we have seen, the intent may be rebutted by any evidence which may raise in the minds of the jury a reasonable doubt of its existence, but such rebuttal it is incumbent on the defendant to make somewhere in the evidence: *People v. Boling*, 83 Cal. 380, 382.

An unlawful act is presumed to have been committed with unlawful intent, but the presumption may be rebutted, and is sufficiently rebutted and overcome when a reasonable doubt is raised as to the defendant's guilt, and if a reasonable doubt is raised, the burden or onus is lifted, and the jury must presume an absence of such criminal intent: *People v. Ah Gee Yung*, 86 Cal. 144, 147.

#### **Map and Survey, Conflict Between, Presumption on.**

An official map of a town plat which, by reference to monuments established, or by some other mode, re-

fers to a survey, is presumed to correctly represent the survey as actually made; but if there is a discrepancy between the map and the survey in the field, the survey must prevail, if the position of the points and lines established by the survey can be proved: *O'Farrel v. Harney*, 51 Cal. 125.

#### **Marriage, Presumed to be in Ignorance of Life of Former Spouse.**

In an action to annul a marriage on the ground of the previous marriage of the woman to another husband, who has not been heard of for four and a half years at the time of the second marriage, in the absence of proof that the first husband was then living, or had not been divorced from the defendant, the presumption in favor of the innocence of the defendant from crime or wrong and of the legality of the second marriage will prevail over the presumption of continuance of life of the first husband; and the burden is cast upon the party asserting her guilt or immorality to prove that the first marriage was not ended by death or divorce before the second marriage: *Hunter v. Hunter*, 111 Cal. 261, 267.

#### **Marriage, How far Presumed from Cohabitation.**

If a man and woman cohabit together as husband and wife, and are held and reputed by their neighbors and friends as married persons, they are presumed to have entered into marriage. Cohabitation and repute do not make marriage, but are merely items of evidence from which it may be inferred that a marriage has been entered into. The facts in evidence must be such as to justify the inference that matrimonial consent had been interchanged between the parties: *White v. White*, 32 Cal. 427, 453.

#### **Married Woman's Contract, Presumptions Against.**

All intending purchasers or encumbrancers are bound to take notice that property conveyed to a married woman by deed of bargain and sale is her separate property, in the proportion in which it had been paid for with her separate funds, and are bound to know at their peril what that proportion was; and



also that it would be her separate property if paid for by the husband with community funds, and by his direction and for the purpose of a gift conveyed to her. The presumption that such property belonged to the community prior to the amendment of section 164 of the Civil Code in 1890 is a mere rule of evidence, fixing the burden of proof; and is not inconsistent with the rule that such recorded deed puts all purchasers or encumbrancers upon inquiry as to the extent of the claim of the wife to the property, whatever it may turn out to be: *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695.

Under our law, no presumption of knowledge, on the part of a married woman, of the contents of a deed arises from the fact of executing it: *Pease v. Barbiers*, 10 Cal. 436.

#### **Ministerial Acts, no Presumption in Favor of.**

In levying assessments, the directors act ministerially, and not judicially, and no presumption arises in favor of their legality: *Hogan v. Pacific Endowment League*, 99 Cal. 248, 33 Pac. 924.

#### **Name, Identity of, Presumption of Identity of Person.**

On a trial for robbery, where the prosecution offers in evidence the deposition taken on the preliminary examination, which shows that the person charged with the offense has the same name as the defendant, and the latter offers no evidence to disprove his identity, the court may instruct the jury that identity of person is presumed from the identity of name, and the failure to instruct that the presumption of identity is only *prima facie* is without prejudice: *People v. Riley*, 75 Cal. 98, 100.

In an action to quiet title by a person claiming under a deed from a grantor having the same name as the defendant, the identity of the grantor with the defendant is presumed from the identity of name: *Ward v. Dougherty*, 75 Cal. 240, 244.

When an indictment charged the defendant with the crime of arson in setting fire to and burning a house, the property of a person bearing the same name as that of the defendant, the law raises the presump-

tion of identity of person from identity of name, and the indictment must be construed as charging the defendant with the burning of his own building: *People v. De Winton*, 113 Cal. 403, 405.

An acknowledgment of a mortgage made before a notary public bearing the same identical name with that of the mortgagee, and made in the county of the residence of both parties, must be presumed, from the identity of name, to have been taken before the mortgagee as a notary public, in the absence of proof to the contrary; and an acknowledgment so taken is void, and does not authorize any record of the mortgage, and the record thereof does not impart constructive notice to third parties of the rights of the mortgagee: *Lee v. Murphy*, 119 Cal. 364, 368.

The identity of the person of the deceased declarant, whose declarations were admitted in evidence, with the brother of the deceased testator named in the will, is presumed from the identity of name; and the will itself is sufficient evidence that the brother named in the will was a member of the family of the deceased testator. The presumption arising from the identity of name is rebuttable, but is sufficient to shift the burden of proof of the contrary upon the other side: *Estate of Williams*, 128 Cal. 552, 555.

#### **Negligence, Presumptions as to.**

A plaintiff injured through the fall of an hydraulic elevator operated by the defendants, in which he is being carried as a passenger, need only prove that he sustained injury by the breaking of the machinery by which he was carried, and that such machinery was under the control and management of the defendants, in order to make a case raising a presumption of negligence on the part of defendants, and is not bound to prove what constituted the fault or negligence of the defendants. The burden is then thrown on defendants to show that they were not guilty of negligence by proof that the injury was caused by inevitable casualty, or proof of any fact relieving defendants from responsibility: *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266.

In action by passenger against two carriers of passengers, for damages caused by a collision, no presumption of negligence arises from the mere fact of the injury, as against the proprietor of the vehicle not occupied by the plaintiff: *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165.

Dropping of chisel upon person walking on sidewalk below raises presumption of negligence upon the part of the person from whom it fell, and proof of it makes a prima facie case of negligence sufficient to prevent a nonsuit: *Dixon v. Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268.

Where a person is injured, while walking upon a public thoroughfare, by anything falling upon him which is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care: *Dixon v. Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268.

The burden is on the plaintiff to prove that at the time of the accident the driver of the team was not exercising ordinary care, but was negligent in the management of the team, and that the injuries to the deceased were the direct result of that negligence; and this proof can only be overcome by counter-proof showing that the driver was exercising ordinary care in the management of the team at that time: *Towle v. Pacific Improvement Co.*, 98 Cal. 342, 33 Pac. 207.

With regard to the question of negligence, it is to be observed that it falls within the province of the jury not only to determine the facts constituting negligence, but also the question as to what would be the conduct "of a person of ordinary prudence" under similar circumstances—which, commonly, is a question of fact, not of law. In general, all these questions are for the jury, whose verdict in favor of the plaintiff must be regarded as conclusive, unless the validity of the defense, both as to the existence of the negligence, and its effect as contributing

proximately to the injury, follows necessarily from the undisputed facts. Hence, as intimated in *Smith v. Occidental etc. Steamship Co.*, 99 Cal. 468, it is only in rare cases that a verdict for the plaintiff can be disturbed on this ground. In this, the case is to be distinguished from a case where the ground of the objection is insufficiency of the evidence to show negligence on the part of defendant, where the affirmative of the issue is on the plaintiff and where, consequently, there must be satisfactory evidence of such negligence: Code Civ. Proc., sec. 2061, Subd. 5; while in cases of the former kind the presumption is in favor of the plaintiff: *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 488.

#### **Negligence, Presumption of from Accident.**

In an action against a railroad company to recover damages for injuries sustained by a passenger, caused by a train running off the track, owing to the negligence of the railroad company, although the burden of proof is upon the plaintiff to establish negligence, yet where the injury is admitted, and the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time of the accident the train was running down a steep incline leading to the bed of a river, on a new and curved track, at an unusual and dangerous speed, the burden of proving that the injury was not caused by its want of care is on the railroad company: *Mitchell v. Southern Pacific R. R. Co.*, 87 Cal. 62, 25 Pac. 245.

The breaking of a wheel of a stage-coach is prima facie evidence that the wheel was defective, and in the absence of evidence showing that it was sound, or that the defect was latent, and could not be discovered by examination, is sufficient to establish the negligence of the carrier and its liability for an injury to a passenger occasioned thereby: *Lawrence v. Green*, 70 Cal. 417, 59 Am. Rep. 428, 11 Pac. 587.

A street railway company, as a carrier of passengers, is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the ex-

exercise of such care; and in case of collision of a street-car with a railway train, to the injury of its passengers, a presumption of negligence arises which throws upon the street railway company the burden of showing that the injury was sustained without any negligence on its part: *Osgood v. Los Angeles etc. Co.*, 137 Cal. 280, 283.

**Notary's Certificate, Presumption in Favor of.**

Presumption is that the certificate of the notary of the acknowledgment of a deed states the facts: *Baldwin v. Bornheimer*, 48 Cal. 433.

The facts recited in a notary's certificate of acknowledgment attached to a receipt and release from liability for a breach of promise of marriage, pursuant to section 1948 of the Code of Civil Procedure, are only prima facie evidence of the execution of the instrument, and are not conclusively presumed to be true. The rule applicable to acknowledgments of conveyances by married women does not apply; and the facts recited in such certificate may be contradicted by any evidence, direct or indirect. An instruction that the evidence of the party named in the certificate, denying the genuineness and due execution of the instrument, is not sufficient to overcome the certificate, should be refused: *Moore v. Hopkins*, 83 Cal. 270, 17 Am. St. Rep. 248, 23 Pac. 318.

**Notice, Presumption of Giving of.**

From lapse of time and acquiescence in the possession of the purchaser, the regularity of a sale under a power may be inferred, and a presumption indulged that due notice thereof as required by the power was given: *Simson v. Eckstein*, 22 Cal. 580.

The statute does not require personal notice to be given of the application for final distribution; and if the complaint does not allege that the notice required by law was not given, it will be presumed that it was given: *Daly v. Pennie*, 86 Cal. 552, 21 Am. St. Rep. 61, 25 Pac. 67.

**Notice of Directors' Meeting, Presumption of.**

In the absence of proof to the contrary, notice to the directors of a meeting will be presumed, though

not recited in the record of the meeting: *Granger v. Original Empire etc. Co.*, 59 Cal. 678.

**Notice of Illegality of Note, Presumption of.**

When the defendant has proved or the plaintiff has conceded that the consideration for a promissory note upon which the former is sued by an indorsee thereof is illegal, a prima facie case of notice to the indorsee of the illegality of the consideration is thereby made: *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286.

**Novation, Contract of, not Presumed.**

A contract of novation must be proven as other contracts are, and will not be presumed where the acts tending to show the novation are consistent with the fact that the original party to the contract is being held thereto, and it appears that such a course would be more advantageous to the party claiming as against the novation: *Haubert v. Mausshardt*, 89 Cal. 433, 26 Pac. 899.

**Official Integrity, Presumption in Favor of.**

The fact that a judge has acted in the trial and decision of a cause must be held conclusive that in his own opinion he was competent to act, and in such a case he who would attack his right to act therein must show his disqualification by facts of a positive and unequivocal character. The presumption which attaches to the integrity of any act which he may perform under the sanction of his official oath cannot be overcome by inference or conjecture: *Heinlen v. Heilbron*, 97 Cal. 101, 31 Pac. 838.

**Office, Validity of Appointment to is Presumed.**

It is a presumption of law that a person acting as a public officer was regularly appointed: *People v. Otto*, 77 Cal. 45, 18 Pac. 869.

The code has not materially changed the common-law rule, that from the undisturbed exercise of a public office a presumption arises that the appointment is valid. This presumption, unless overcome by other evidence, will support a finding that the incumbent of an office is de jure such officer: *Delphi School Dist. v. Murray*, 53 Cal. 29.

**Officer, Qualification of, Presumption of.**

Where it appeared that the claimant of the office had acted as sheriff, that being the office in controversy, that fact, together with the certificate of election, would raise the presumption that he had executed his bond and taken the oath of office: *People ex rel. Attorney General v. Clingan*, 5 Cal. 389.

**Orders of Court, Presumptions in Favor of.**

When a court makes an order, and it does not appear on the face of the record that the court did not have jurisdiction to make it, it will be presumed, in a collateral attack, that the parties were before the court, and that the proper proceedings were had to authorize the court to make the order: *Clark v. Sawyer*, 48 Cal. 133.

**Ordinances, Presumption in Favor of.**

The act of a city council of a municipality in fixing water rates under article 14, section 1, of the constitution is a legislative act, and when performed is to receive all the presumptions and sanctions which belong to acts of legislative bodies generally; and the rates must be assumed to have been so fixed as to be just both toward the rate-payer and toward the company, and the mode of collection provided must be assumed to be that which will best subserve the interests and rights of both parties: *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439.

**Organization of Toll-road, Validity of, Presumption of.**

A person in the possession of a road claimed by him to be a toll-road, authorized by the legislature to be continued for twenty years, who has collected tolls thereon for over twenty years since the passage of the act, and who shows no other franchise therefor, will be presumed to have claimed the right to tolls under the original grant, and to have collected them lawfully during the existence of the franchise, although there is no direct evidence that the persons named in the act, or their assigns, constructed the road, or that he was an assignee of such persons, or collected tolls under that franchise: *Blood v. Woods*, 95 Cal. 78, 30 Pac. 129.

**Official Action—Presumption on Review of Action of Supervisors in Rejecting a Claim.**

In a proceeding in the superior court of Fresno county to review the action of the board of supervisors of that county in rejecting portions of each claim presented for constable's fees, where the case was submitted upon an agreed statement of facts which did not show upon what ground they were rejected, the superior court was authorized to presume that they were rejected upon any ground not negatived by the statement, and that they were properly rejected because in excess of the fifteen hundred dollar limit fixed by section 188 of the County Government Act: *Green v. County of Fresno*, 95 Cal. 329, 30 Pac. 544.

**Official Action—Presumption That Elisor Did His Duty.**

In the event of the disqualification of the sheriff and coroner, a district court has the right to appoint an elisor. And even if such authority was not conferred by statute, the court, by virtue of its original jurisdiction, has the power to appoint a special officer to execute its process: *Wilson v. Roach*, 4 Cal. 362.

Where a substitute sheriff (elisor) was appointed, and the pleadings did not show that there was no sheriff or coroner, or that these officers were disqualified, held, that the appointment being made by a judge having competent jurisdiction, the presumption of law is that he faithfully performed his duty: *Turner v. Billagram*, 2 Cal. 520.

**Official Action—Presumption that Elisor Did His to Have Been Done was Rightly Done.**

The rule by which inspection of the record is governed is, that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. In such case, it will be presumed that what ought to have been done was not only done, but rightly done; but where the record states what was done it will not be presumed that something different was done. A want of jurisdiction affirmatively appears on the face of the record, when



whatever was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction: *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

**Official Action—Presumption of Performance of Official Duty.**

When the certificate of the listing of indemnity school selections to the state was made in and transmitted from the department of the United States government, where the duty to make and transmit it resided, to the state land office, the state has a right to rely upon the presumption that the officers of the general land office of the United States properly performed their official duty in regard to the listing of the lands; and, whether the signature of the commissioner of the general land office is genuine or not, the certificate cannot be assailed on account of any defect in the authentication of it, after the state has passed title to the land by its patent, and the certificate has been treated as genuine by both the state and federal land office: *Howell v. Slauson*, 83 Cal. 539, 23 Pac. 692.

The production of the receiver's receipt is sufficient prima facie proof of a homestead entry in the United States land office. It must be presumed that the official duty of the register and receiver was regularly performed in accordance with the department rules, of which the court takes judicial notice: *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. 680.

In action against a sheriff, the sheriff being charged with a specific act of negligence, there can be no presumption in favor of the sheriff and his sureties that the sheriff had performed his official duty, where such presumption in his favor would necessarily result in a counter-presumption that the clerk had failed to perform his duty as a public officer: *Boyd v. Desmond*, 79 Cal. 250, 21 Pac. 755.

It must be presumed, in the absence of evidence to the contrary, that the clerk in making up the judgment-roll regularly performed his official duty, and made it up within the proper time, including all papers then on file which should have gone into it: *Gordon v. Donahue*, 79 Cal. 501, 21 Pac. 970.

It will be presumed that official duty has been performed, and, whenever there is a charge made of official default, the burden of proof is upon the party making the allegation: *Los Angeles v. Lankershim*, 100 Cal. 525, 35 Pac. 153.

It is a presumption of law that official duty has been regularly performed: *People v. Otto*, 77 Cal. 45, 18 Pac. 869.

The presumptions are that the act of an officer, within the general scope of his powers and duties, was correctly performed: *Weaver v. Fairchild*, 50 Cal. 360.

The law presumes that every officer will faithfully perform his duties, until the contrary is shown: *Egery v. Buchanan*, 5 Cal. 53.

To the objection that it did not appear that plaintiff had a certificate of purchase when the act of 1872 went into operation, and therefore was not entitled to the benefit of its provisions, held, the plaintiff is entitled to the presumption that the officer issuing the patent regularly performed his duty in issuing it to him, and that he would not have issued it had not the plaintiff brought himself within the provisions of the curative act: *Upham v. Hosking*, 62 Cal. 251.

An officer will not be presumed to have exceeded his authority, especially the officer of a foreign government: *Den v. Den*, 6 Cal. 81.

The presumption is that public officers in charge of official documents have done their duty in preventing forged papers from being placed among them, and this presumption applies equally to the public functionaries of Mexico, as to those of the United States: *Sill v. Reese*, 47 Cal. 294.

The general rule is that when the acts of the officers of a foreign government are brought in question in our courts, the acts performed by them will be presumed to have been within the scope of their lawful authority, unless the contrary appears: *Mott v. Reyes*, 45 Cal. 379.

Where an officer, in making a sale of property, acts under a naked statutory power with a view to divest, upon certain contingencies, the title of the citizen,

the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed. No presumption is in such case to be indulged that the officer has performed his duty, or complied with the law: *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

The rule by which a presumption of compliance with legal formalities in a sale by officers, or trustees, is sometimes raised by lapse of time with possession in the purchaser, only authorizes the presumption as to intermediate steps in the proceeding. That which is the foundation of the authority to sell, as well as the execution of the deed by which the sale is consummated, is not within the rule, and must in all cases be proved: *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

#### **Official Action—Presumption in Favor of.**

Where judgment was entered upon default for one hundred and twenty-four dollars and seventy-five cents, and it did not appear that any testimony had been heard, the presumption that a judicial officer has acted regularly was held to apply to the case, and nothing appearing to the contrary, the supreme court will presume that the judge had informed himself as to the matter of complaint in a proper and regular manner, and such judgment will be affirmed: *Crane v. Brannan*, 3 Cal. 192.

Where the defendant has confessed the former convictions, the presumption is that the clerk performed his duty in reading the indictment to the jury, and omitted to read that part of the indictment which related to the prior convictions, and this presumption is not overcome by a statement in the record "that the information charging the defendant with the above crime was read, and plea of not guilty stated to the jury": *People v. McGregar*, 88 Cal. 140, 26 Pac. 97.

The defendant was charged by information with burglary, and with prior convictions of robbery and burglary. When called upon to plead, he acknowledged the prior convictions, and pleaded not guilty to the charge in the information. After the jury was

impaneled, the information was read, and the defendant's plea duly stated to them. So far as shown by the record, no reference was made to the charge of prior convictions during the trial, either in the instructions of the court or otherwise. The jury found the defendant guilty of burglary in the first degree, but did not find in reference to the prior convictions, and the court sentenced him to imprisonment for only ten years, instead of imposing the extreme penalty of the law. Before sentence was pronounced, the charge of prior convictions was withdrawn. Held, that, in the absence of an affirmative showing to the contrary, it would be presumed that the clerk, in reading the information to the jury, omitted to read the charge of prior convictions, as required by section 1093 of the Penal Code: *People v. Flynn*, 73 Cal. 511, 15 Pac. 102.

When the regulations of 1828, governing Mexican grants, require that a grant shall not be held to be sufficiently valid without the previous consent of the territorial deputation (legislature), and provides that the definitive grant being made, a document signed by the governor shall be given to serve as a title to the grantee, and the governor delivers the title, the presumption arises that the governor fulfilled his duty, and that the grant had the approval of the legislature, and, if the contrary be asserted, it must be shown by proof: *Vanderslice v. Hanks*, 3 Cal. 27.

Presumption attaching to grant of pueblo lands is not overcome, nor is it sufficiently established that the land granted was a public plaza at the date of the grant, by mere evidence that before the grant the land was vacant, and was used by the owners of adjacent lots in going to and from their lots, and that, upon certain days, the public would use it as a place for public amusements: *Latham v. City of Los Angeles*, 87 Cal. 514, 25 Pac. 673.

The presumption attaches to a grant of lands by the ayuntamiento of a pueblo to a private person, who has been put in possession by the alcalde, that the authorities of the pueblo acted within the limits of their official authority in making the grant: *Latham v. City of Los Angeles*, 87 Cal. 514, 25 Pac. 673.

A grant of a lot in San Francisco, made by an alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the pueblo: *Cohas v. Raisin*, 3 Cal. 443.

Grants made after the 15th of September, 1847, must be presumed to be made by the authority of the ayuntamiento, or council, so long as that body existed: *Cohas v. Raisin*, 3 Cal. 443.

The official acts of alcaldes in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority: *Hart v. Burnett*, 15 Cal. 530. Cited 58 Cal. 69.

A grant of land made by a Mexican alcalde before the war will be presumed to have been made in the course of his ordinary and accustomed duties, and within the scope of his legitimate authority; and the burden of proof lies on him who controverts the validity of such a grant to show that it is not made by a competent officer, or in the forms prescribed by law: *Reynolds v. West*, 1 Cal. 322.

Where it appeared that the petitioner's husband was the owner of two fifty-vara lots at the time the concession was made to her, held, that it would be presumed that the act of the alcalde, in making the grant, was in conformity with law, until it should be shown that the petitioner's husband had received the lots which he held as a concession of public lands, and not by purchase from an individual: *Reynolds v. West*, 1 Cal. 322.

A grant by an alcalde of a town lot in San Francisco, after the conquest and cession of California, down to the incorporation of the city in April, 1850, will be presumed, until the contrary be shown, to be within the authority of such alcalde, and the lot granted will be presumed to be within the limits of the pueblo: *Payne v. Treadwell*, 16 Cal. 220.

The authorities, as to the presumptions in favor of the validity of grants made by public officers, cited and approved: *Payne v. Treadwell*, 16 Cal. 220.

It is too late to question authority of alcalde elected in 1846. If invalid, his acts as a de facto officer must be held good by this court: *Cohas v. Raisin*, 3 Cal. 443.

The commissioner of the general land office, being authorized to perform executive duties relative to the public lands, under the direction of the Secretary of the Interior, when it appears that he has withdrawn railroad land from pre-emption, it will be presumed that it was withdrawn by the direction of the Secretary of the Interior: *Weaver v. Fairchild*, 50 Cal. 360.

If a patent shows that it was issued in the absence of legislation directing a sale of the property described, it is void upon its face: *Rondell v. Fay*, 32 Cal. 354.

A party claiming land under a patent from the United States has the benefit of the presumption that the officers rightly performed all their duties in selling the land and issuing the patent, and it devolves on the party assailing the patent to show that it was issued without authority of law: *Collins v. Bartlett*, 44 Cal. 371.

It is not necessary that a patent of the United States to land granted by the Mexican government should contain a recital that the survey had been published. It will be presumed, in support of such patent, regular on its face, that the proper officers of the land department determined, prior to the signature of the patent, that due publication of the survey had been made: *Cruz v. Martinez*, 53 Cal. 239.

A patent is prima facie evidence of title in the grantee, as the law presumes in favor of the acts of all public officers: *Summers v. Dickinson*, 9 Cal. 551.

A patent for public land, not void upon its face, is prima facie valid; and the burden of showing its invalidity is on the party attacking it: *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. 239.

The issuance of a certificate of purchase of school land is presumptive evidence of the fact that the proper officers have performed every act required of them by law in order to vest in the state the legal

title to the land at the time of the issuance of a certificate: *Watkins v. Lynch*, 71 Cal. 21, 24.

But the law authorized the assessor to ascertain and determine whether the real property was sufficient to secure payment of the taxes upon the real and personal property, and if, "in his opinion," it was not, the law cast upon him the imperative duty of enforcing collection of the taxes against the personal property. That duty was presumed to be regularly performed by the assessor, and the judgment or opinion which he formed, and upon which he acted, is not reviewable by the courts after he has collected and paid over the taxes to the county treasurer. It is well settled that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions: *County of San Mateo v. Maloney*, 71 Cal. 205, 208; *Ballerino v. Mason*, 83 Cal. 447, 449.

There is a presumption "that official duty has been regularly performed." The proper officers, in the discharge of their official duty, decided that this portion of Vallejo street had been graded. This presumption is open to rebuttal; but when the witnesses who were expressly employed to find departures from the official grade find no wider departure than that described in the evidence we are of opinion the presumption should still remain: *Fanning v. Bohme*, 76 Cal. 149, 152.

When the pleadings of both parties upon a contest of the right to purchase school land state that a proper survey was made, and a copy of the order of the state surveyor general, certifying that the land was listed to the state by the register of the United States land office, is introduced in evidence without objection, the pleadings and evidence, taken together with the presumption that the certificate is truthful, and that the proper officers have performed the duties required of them before such certificate could be made, there being no evidence to the contrary are sufficient to sustain a finding that the land had been surveyed by the surveyor general of the United States, and that

the survey and plat duly approved was filed by him in the United States land office, before the listing of the land to the state: *Bode v. Trimmer*, 82 Cal. 513, 516.

The law presumes "that official duty has been regularly performed," and as Judge Campbell knew whether or not he was interested in the result of the case, it must be presumed from his action in denying the motion that he was not so interested: *Southern C. M. R. Co. v. National Bank*, 100 Cal. 316, 321.

An application for a new trial is addressed to the legal discretion of the court, and, in the absence of a clear showing to the contrary, it will be presumed that its discretion was properly exercised: *Minturn v. Bliss*, 77 Cal. 90, 19 Pac. 185.

An affidavit was entitled in the court and cause, and contained the usual jurat and a seal of the notary, but it did not state a venue. Held, that the objection of a want of venue cannot be sustained in view of the facts and legal presumption in this case, even if it be true that the want of a venue is in general fatal to an affidavit: *Reavis v. Cowell*, 56 Cal. 588, 589.

Under sections 3414 and 3415 of the Political Code, the superior court obtains jurisdiction of an action to determine a contest between conflicting claimants of the right to purchase state land, which has been referred to it for trial, although the certified copy of the order for trial does not affirmatively show that the order was entered in a record-book in the office of the surveyor general. If the surveyor general certifies that the copy of the order is a copy of a document on file in his office, it will be presumed that the order was regularly entered in a record-book: *Eads v. Clarke*, 68 Cal. 481, 484.

It must be presumed, in the absence of allegations and evidence to the contrary, that an administratrix has obeyed the law and performed her official duty, and that all the property and money of the estate for which she was accountable at the time of her death has passed into the possession of her successor: *Gray v. Farmers' Exchange Bank*, 105 Cal. 60, 65.



The presumption is that official duty is regularly performed, and it seems to us that, when respondents presented their warrant to appellant for payment, there being money in the proper fund for that purpose, they were apparently entitled to have it promptly paid without question; and, when they were compelled to go into court to compel payment, they made a prima facie case by setting out the regular issuance of the warrant, their ownership of it, the refusal of the treasurer to pay it, and the fact that there was money in the treasury out of which it could be paid: *McGowan v. Ford*, 107 Cal. 177, 186.

The law presumes "that a person acting in a public office was regularly appointed to it, and "that official duty has been regularly performed." If, therefore, the defendant, while acting as deputy assessor, received as such officer moneys belonging to the county, and fraudulently appropriated them to his own use, he was guilty of embezzlement under the provision of section 504 of the Penal Code: *People v. Cobler*, 108 Cal. 538, 542.

In an action by the assignee to recover upon a liability existing in favor of the insolvent, where the complaint alleges an order duly made appointing the plaintiff as assignee of the insolvent debtor, and that he was qualified as such assignee, and entered upon the discharge of his duties, etc., it cannot be objected upon general demurrer that the complaint does not allege that an assignment of the insolvent's property was made to the assignee by the clerk of the court; but in the absence of a special demurrer going to that ground it must be presumed that the clerk, who is an officer of the court acting under its direction, discharged the duties specifically enjoined upon him: *Rued v. Cooper*, 109 Cal. 682, 691.

That the ordinance was passed at a regular session was one of the presumptions afforded by the prima facie showing made, and, if defendant desired to overcome that presumption by showing that in fact it was not so passed, the burden was upon him: *Merced County v. Fleming*, 111 Cal. 46, 49.

The equitable title to lands sold by the state, for which certificates of purchase have been issued, on

payment of part of the purchase price, is subject to taxation, and when such lands are afterward sold to the state for delinquent taxes, the equitable title reverts in the state, subject to redemption as provided by statute; and if thereafter the state issues patents for the land, such patents must be presumed to have been regularly issued in performance of official duty, after compliance with all conditions precedent, and to have passed the complete title of the state, and the owner of such title may enjoin the execution of a deed to the state under the sale for delinquent taxes: *Russ & Sons Co. v. Crichton*, 117 Cal. 695, 702.

In an action to foreclose a mortgage, where defendants claim title under a purchase at a sale under another decree of foreclosure, a decree for the defendants is sufficiently supported by findings that the order of sale under which the title was obtained was duly issued out of the superior court, under the seal of said court, without specifically stating that the order of sale was subscribed by the clerk; and it will be presumed in favor of the decree that it was so subscribed, where there is no bill of exceptions showing the contrary: *Spaulding v. Howard*, 121 Cal. 194, 197.

It will be presumed, in the absence of any showing to the contrary, that the refusal of the register of the land office to file the declaratory statement of the alleged pre-emptioner was proper: *Central Pacific R. R. Co. v. McCann*, 126 Cal. 553, 555.

The complaint not expressly negating the nomination of the defendant by petition or certificate containing the signatures of a sufficient number of electors, and expressly showing that the clerk received the name of the defendant upon the ballots, and that a certificate of election had been issued to him, it must be presumed that the official duty was regularly performed, and that the defendant was nominated and elected, and duly received the certificate of election: *Powers v. Hitchcock*, 129 Cal. 325, 328.

Nor do we think the presumption "that actual duty has been regularly performed" can dispense

with the proof that a certificate was issued, and of its contents. But if it be conceded that there is evidence tending to show that a certificate did issue, there can be no valid certificate where the previous steps made necessary to its issue have not been taken: *Wall v. Mines*, 130 Cal. 27, 39.

The judicial action of the officers of the land department, entitled to decide a contest, cannot be delegated; but the law presumes that they have discharged their duties, and this presumption cannot be overcome by loose statements in the cross-complaint, made merely upon information and belief: *Rogers v. De Cambra*, 132 Cal. 502, 506.

Under section 1792 of the Code of Civil Procedure, a guardian, unless directed so to do by the court, need not give notice to anyone of an application by him for an order authorizing him to invest the money of his ward in a particular manner. Such an order is presumed to have been made by the court in the discharge of its official duty, and to be within the lawful exercise of its jurisdiction, and is a complete exoneration of the guardian for making the investment in accordance therewith: *Estate of Schandoney*, 133 Cal. 387, 390.

It must be presumed that indorsements made at different times upon a package of papers produced from the engineer's office, comprising the diagram, warrant, return and certificate of the engineer, referred to by the indorsements made thereon, respectively, were in the package when the indorsements were made. It must be inferred that the papers required by law to be attached together were so attached, and it cannot be presumed, contrary to the indorsement, that the certificate of the engineer was not in the package, or was wrongfully made elsewhere than in the engineer's office: *Reid v. Clay*, 134 Cal. 207, 211.

In an action upon a street assessment, in which the court found that the street work was previously done in front of defendant's lot under a private contract, and that plaintiff performed no work in front of the property, it is to be inferred from these find-

ings, in support of the judgment against the plaintiff, that the work done by contract was coextensive with the work ordered by the supervisors in front of such lot, and conformed to the law, and was satisfactory to the street superintendent, and that his official duty was regularly performed: *De Haven v. Berendes*, 135 Cal. 178, 180.

New titles to allotted parts of the grant having been issued to the individual adult heirs, who do not appear to have acted irregularly or fraudulently, it must be presumed, in view of all the facts and of the confirmation thereof, that such new titles were regularly issued, and were right and just; and no trust will be enforced as against such titles: *De Castro v. Fellom*, 135 Cal. 225, 231.

After judgment in favor of the assignee, all reasonable intendments, in the absence of any special demurrer will be allowed in support of the regularity of the proceedings, and it will be presumed that the court and clerk acted regularly, and that the conditions precedent to their alleged action had been regularly performed: *Earnsworth v. Sutro*, 136 Cal. 241, 244.

Any presumption of the genuineness of the warrants paid by the treasurer to the absconding librarian, growing out of the presumption that "official duty was regularly performed," is disputable, and is sufficiently overcome by proof that the warrants had never been delivered to any of the claimants, or to anyone for them, and had never been delivered for their use in payment of any part of the demands in their favor: *Robertson v. Library Trustees*, 136 Cal. 403, 406.

The deed of the city and county, so executed, is at least prima facie evidence of all facts essential to its validity; and grantees claiming thereunder need not prove that the prerequisites of the law had been complied with, or that their case came within the provisions of the act. If the presumption in favor of the deed is not overcome by sufficient evidence, the deed itself is proof of title in the grantees: *San Francisco etc. Land Co. v. Hartung*, 138 Cal. 223, 227.

**Ownership, Presumption from Possession.**

Possession of personal property is prima facie evidence of ownership: *Goodwin v. Garr*, 8 Cal. 615.

Lawful possession of personal property is prima facie evidence of ownership: *Killey v. Scannell*, 12 Cal. 73.

The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule: *Bailey v. Steamer New World*, 2 Cal. 370.

Possession of personal property by a person engaged in business on his own account is only prima facie evidence of ownership, and does not prevail against the true owner, except as to negotiable instruments, and whatever comes under the general denomination of currency: *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196.

Lands held by no other tenure than possession may be the legitimate subjects of control: *Johnson v. Rickett*, 5 Cal. 218.

Parties in possession of land, claiming title, are presumed to be owners thereof: *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 577; *Williamson v. Tobey*, 80 Cal. 497, 25 Pac. 65.

Proof that a party had actual possession of land is prima facie evidence of title: *Kelly v. Mac*, 49 Cal. 523; *McGovern v. Mowry*, 91 Cal. 383, 27 Pac. 746.

Possession of land at death of party gives prima facie title to his heirs or representatives: *Baldwin, J.: Gregory v. McPherson*, 13 Cal. 562.

Actual possession of property is only evidence of title and may exist without ownership: *Zaro v. Dakan*, 76 Cal. 565, 18 Pac. 680.

A party who has been permitted to remain in possession under contract for the purchase of land for a long period of time, without objection, will be held to be in possession under his contract, although his original entry may not have been under the contract, and no provision as to possession was contained in it: *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 924.

Where two parties rely upon possession solely, as proof of title, the presumption of ownership is in favor of the first possessor: *Potter v. Knowles*, 5 Cal. 87.

Where the title to land rests in possession only, the prior possessor has the better title: *Ayres v. Bensley*, 32 Cal. 620.

In an action for the recovery of land, possession gives the better right against a mere intruder; and, when the possession is shown in the plaintiff, a nonsuit should not be ordered: *Wolfskill v. Malajowich*, 39 Cal. 276.

Prior possession is evidence of title, and this cannot by any system of reasoning, be made to yield to mere color of title: *Norris v. Russell*, 5 Cal. 249.

The fact of prior possession being evidence of title is not for a jury to determine; it is so declared by law; *Castro v. Gill*, 5 Cal. 40.

The person who first takes possession of land makes it his by occupancy as against all the world except the true owner, and the land remains his as against all persons entering afterward without his consent, and without title, unless he abandons it, or it is taken from him by some method known to the law: *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181.

A had a house, corral, garden, and orchard on a tract of eighty acres of land, and claimed possession of the entire tract; but his actual possession did not extend beyond his improvements. B afterward inclosed the entire tract with a fence, and put another house thereon. A then brought an action against B to recover possession of the entire tract, and the defendant recovered judgment. Held, that the judgment was erroneous in this, that A was entitled to judgment for the house, corral, garden, and orchard, of which he had the prior actual possession: *Kile v. Tubbs*, 23 Cal. 431.

Mere prior possession of land cannot prevail against present possession of defendant, taken under claim of title derived, regularly or not, from the rightful owner: *Gregory v. Haynes*, 13 Cal. 591.

There was no evidence tending to show that the stock so delivered was the property of the defendants; while the presumption is "that a thing delivered by one to another belonged to the latter": *Rued v. Cooper*, 119 Cal. 463, 467.

To establish their right to what is known as a "way of necessity" over defendant's land, the plaintiffs were required to show, among other things, that they had no other access to the county road. To this end they were attempting to show that, when they received their deed, the land lying between this land and the county road was the land of a stranger. This could be shown by parol, and it was not necessary in the first instance to introduce record evidence of the stranger's title: *Weyl v. Sonoma Valley R. R. Co.* 69 Cal. 199, 202.

The party making annual expenditure upon one of two claims held in common is not required to prove the location and record title of the claim upon which the work was done, if the title to such claim is not in dispute. It is sufficient to prove actual possession and improvement of such claim, from which the law presumed ownership: *De Noon v. Morrison*, 83 Cal. 163, 166.

The presumptions which arise in support of a patent for public land, issued by the state, can have no force in face of the facts that the state selection of the same was originally void, and that the selection has been validated by Congress: *Chant v. Reynolds*, 49 Cal. 213.

Though a patent be in fact issued without authority of law, because the state had no title to grant, the presumption, in an action of ejectment, is, in the first instance, that the patent is valid and passes the title, and the burden of proof is cast on the one who undertakes to impeach the patent to establish the facts necessary for its overthrow: *People ex rel. Pixley v. Stratton*, 25 Cal. 242. Cited 78 Cal. 381, 20 Pac. 740.

Whether a state patent to land other than a sixteenth or thirty-sixth section is conclusive or not, it is at least prima facie evidence of title, and if a defendant in ejectment can attack it at all, the burden

is on him to show its invalidity: *Hebbron v. Graves*, 78 Cal. 380, 20 Pac. 740.

**Payment, Presumption as to Kind of Money in Which Notary Demanded Payment.**

Presumption is that notary demands payment of draft in currency in which it appears on its face to be made payable, in the absence of evidence to the contrary: *Langenberger v. Kroeger*, 48 Cal. 147, 17 Am. Rep. 418.

**Payment of Rent After Term Expires, Presumption Arising from.**

The payment of monthly rent, after the expiration of a lease for years with rent payable each month, is a mere fact in evidence from which an agreement for a further term may be presumed, but, if the evidence tends to show that the tenant refused to accept a new term of a year, that fact tends to overthrow this presumption: *Skaggs v. Elkus*, 45 Cal. 154.

The presumption that when a tenancy is shown the continued possession of the tenant is in the same capacity is overcome by proof of an express agreement by the terms of which the tenant is to hold possession as a mere servant: *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

**Probate Proceedings, Presumptions in Favor of.**

Under our statute (Acts 1858, p. 95)), the same presumptions as to jurisdiction attach to the proceedings of probate courts, within the jurisdiction conferred on them by law, as in the case of district courts: *Irwin v. Scriber*, 18 Cal. 499.

**Professional Visits Presumed to be Necessary.**

A physician employed to attend a patient is the best and the proper judge of the necessity of frequent visits, and, in the absence of proof to the contrary, the court will presume that all the professional visits were deemed necessary and were properly made: *Todd v. Myres*, 40 Cal. 358.



**Regularity of Private Transactions Presumed.**

Where a contract to convey land provided that a deed to the land should be placed in escrow until the performance of certain conditions on the part of the grantee, and should be thereupon delivered to the grantee, a complaint by an assignee of the grantee for a specific performance of the contract, which alleges that the grantee fully performed the contract on his part, and after having become entitled to a conveyance from the defendant, conveyed all his right, title and interest in the land to the plaintiff, and that plaintiff has demanded a conveyance from the defendant of the same, which defendant refused to make, but which does not allege a refusal by defendant to place a properly executed deed in escrow according to the terms of the contract, does not state a cause of action, and is subject to a general demurrer. In accordance with the presumption that private transactions have been fair and regular, it must be presumed that such deed was placed in escrow pursuant to the terms of the contract, in the absence of an allegation to the contrary; and it follows that the grantor was not in default at the time of the demand upon him for a deed, and properly refused to make a second conveyance of the land, the allegation of such demand and refusal not being inconsistent with the presumption that the contract was complied with: *Lattin v. Hazard*, 85 Cal. 58, 61.

**Salary, no Presumption of Regular Appointment to Office.**

We are of opinion that such presumption that one acting in a public office was regularly appointed to it does not apply to the case of an officer prosecuting an action to recover his salary. In such case he must establish his title by proof of an appointment made as required by law: *Burke v. Edgar*, 67 Cal. 182, 184.

**Sentence and Judgment, Presumption in Favor of.**

If the indictment contains more than one count, each charging a distinct offense, and the verdict is general, finding the defendant guilty, the presumption will be that the judge who tried the case pro-

nounced judgment for the offense to which the evidence was directed, and was properly applicable: *People v. Shotwell*, 27 Cal. 394.

**Sidewalks Presumed to be Safe.**

A person walking along the sidewalk of a street in a city, not near a crossing, has a right to assume that the place is safe: *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55, 13 Pac. 657.

**Street Contract, Presumption of Regularity of.**

Where the contract to grade the street was entered into for a certain sum per cubic yard, and afterward, without any request of the contractor, another resolution of intention was published, resulting in a second contract with the same contractor for a larger sum per cubic yard, and no reason appears for letting the second contract, it will be presumed that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for its action, and an assessment against the owners is not thereby invalidated: *Spaulding v. North San Francisco Homestead etc. Assn.*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249.

**Signature, Drawee Presumed to Know, of Drawer.**

The drawee of a check is presumed to be acquainted with the signature of the drawer, but not with the handwriting in the body of the check; and the fact that the handwriting in the body of the check is not that of the drawer raises no presumption that it is not genuine: *Redington v. Woods*, 45 Cal. 406.

**Signature, Presumption that Each Obligor Signed on Condition that Others Would Sign.**

The presumption is that each signed upon the understanding that the others named as obligors would also sign: *City of Sacramento v. Dunlap*, 14 Cal. 421.

**Signature, Presumption of Genuineness of Official.**

The genuineness of the signatures to the official documents of officers of Mexico, which are now in the custody of the surveyor general of the United States, will be presumed, in a case where such sig-

natures are used for a collateral purpose, such as to enable a witness who has examined such documents to testify as to the genuineness of the signature to a paper offered in evidence from having seen such signature on such documents: *Sill v. Reese*, 47 Cal. 294.

**State of Mind Presumed to Continue.**

A "state of mind once proved to exist is presumed to remain such until the contrary appears": *Smith v. Capital Gas Co.*, 132 Cal. 209, 213.

**Suppressed Evidence Presumed Adverse.**

Nor is there any agreement on her part contained in the contract accompanying the deed of November 29th where, if there were such an agreement, it would naturally be expressed. If there was such an agreement, it must have been in writing, and could be produced: *Odell v. Moss*, 130 Cal. 352, 356.

An instruction based upon the mere nonproduction of witnesses by the defendant to corroborate his testimony that the forged check was won at gaming, that "where weaker evidence is produced when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse if produced," is erroneous in substituting the word "weaker" for the word "inferior" used in section 1963, subdivision 6 of the Code of Civil Procedure; and also as being inapplicable to the facts, and implying that other witnesses engaged in the gaming would be higher and stronger evidence than that of the defendant: *People v. Dole*, 122 Cal. 486, 493.

**Survivorship, Presumption as to.**

When there is nothing to show which expired first, and husband and wife have perished in the same calamity, both being between the ages of fifteen and sixty, the husband is presumed to have survived: *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855.

When both husband and wife perish in the same calamity, no presumption of survivorship of the wife arises from the fact that an order of a probate court, granting letters of administration upon her estate,

recites that she was "the surviving wife" of her husband. In a proceeding by her administrator to set aside the probate of her husband's will, it is error to refuse evidence aliunde upon the question of survivorship: *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741.

**Taxes, Order on Equalization of, Presumptions on.**

The order of the board of equalization, reciting that testimony was taken, and, in effect, that the conclusion was reached from the evidence that the bank had returned a false statement, and had escaped assessment for a specified amount of solvent credits, is conclusive, in a proceeding under a writ of review to annul the order, that evidence was introduced before the board showing such facts: *Farmers' etc. Bank of Los Angeles v. Board of Equalization of Los Angeles*, 97 Cal. 318, 32 Pac. 312.

When the record does not show by affirmative proof that the board of equalization did not act upon evidence before it, its order increasing an assessment after due notice to the party whose interests are affected, is conclusive that it did act upon such evidence as was necessary: *Hagenmeyer v. Board of Equalization of Mendocino County*, 82 Cal. 214, 23 Pac. 14.

Presumption of law is that board of equalization perform their duty and correct any inequality in the assessment of taxes: *Guy v. Washburn*, 23 Cal. 111.

**Tax, Action for Delinquent, Presumptions in.**

In an action by a county to recover state and county taxes, the assessment-roll, in the form prescribed by law, is prima facie evidence of the plaintiff's right to recover: *Modoc County v. Churchill*, 75 Cal. 172, 16 Pac. 771.

In making the duplicate assessment-roll, or a certified copy, prima facie evidence of a right to recover, the statute makes the roll or the copy some evidence that the person named did own the property specified. Held, therefore, notwithstanding the testimony of the defendant that he did not have any money

at the time of the assessment, the finding of the court below on this point against the defendant will be sustained: *San Francisco v. Phelan*, 61 Cal. 617.

Under the revenue act of March 28, 1874, the delinquent list was prima facie evidence of every fact necessary to maintain an action for taxes: *People v. Donnelly*, 58 Cal. 144.

The delinquent list of taxpayers, in a city incorporated under the act of 1850, is not prima facie evidence of the correctness of the prior proceedings, by which the tax was levied and assessed: *Los Angeles v. Los Angeles W. W. Co.*, 49 Cal. 638.

In an action to collect a delinquent tax, it will be presumed that the assessor, in making the assessment acted in accordance with the law, and it is incumbent on the defendant to show that his acts were unauthorized: *City and County of San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264.

#### **Tax Deed, Presumptions as to.**

By the doctrine of the common law a party claiming under a tax deed must show that all the requirements of the law, from the first to the last, have been complied with. Though the statute has altered the rule, and made the deed prima facie evidence of the conveyance of all the title of the delinquent, it does not dispense with the necessity of the officer reciting in the deed the authority under which he acted. The deed has no validity as an independent conveyance. It depends upon the statute, and if, by any of its recitals, it appears that any material requisition of the law has been omitted, the deed is void: *Ferris v. Coover*, *Ferris v. Chapman*, 10 Cal. 589; *Lachman v. Clark*, 14 Cal. 131.

The fact that a tax deed is prima facie evidence of certain facts makes it none the less obligatory to comply strictly with the law. The deed simply shifts the burden of proof: *Kelsey v. Abbott*, 13 Cal. 609.

If sufficient money is paid to the county treasurer to redeem land sold for taxes, and the payment is made for the purpose of effecting a redemption, and a receipt is taken, the redemption is effected, even

if the receipt is not filed with the recorder, and recorded by him: *Cooper v. Shepardson*, 51 Cal. 298.

**Title in Grantee, Presumption of.**

If there is nothing on the face of a deed to indicate a trust capacity in the grantee, and no evidence is given as to the character of the trust, he must be presumed to have taken the fee simple title to the land, and to have been authorized to dedicate a street: *Logan v. Rose*, 88 Cal. 263, 26 Pac. 106.

**Uniform Procedure, Presumption Arising from.**

Constant and uniform procedure continued by courts for long time is strongly persuasive that the practice is correct: *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419.

**Undue Influence, Presumption as to.**

The principal beneficiary under a will was the partner of the testator, at the time of the testator's death and for many years previous. Held, that this did not per se raise a presumption of undue influence: *Estate of Brooks*, 54 Cal. 471.

**Viewers, Validity of Appointment of.**

In the absence of affirmative proof to the contrary, it will be presumed, in support of an order appointing viewers, that the board of supervisors determined the fact that the petition was presented and signed by at least ten freeholders of the road district taxable therein for road purposes, that one of the viewers is a surveyor, and that all of the viewers are disinterested citizens of the county, and not petitioners: *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. 710.

**Wills, Presumptions in Favor of Validity.**

Presumption of law, in absence of all proof, upon the contest of a will, is in favor of the will: *Estate of McDevitt*, 95 Cal. 17, 30 Pac. 101.

**Witnesses, Presumption that They Speak the Truth.**

An instruction to the jury, requested by the defendant, that "every witness, the defendant in-

cluded (if called as a witness), is presumed to speak the truth, and the jury are bound to remember such presumption in determining the facts admitted to them for their consideration," is properly qualified by the court by adding that "this presumption is a disputable one, and is not conclusive upon you. You are the sole and exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony of each. In determining the weight of the testimony, you have the right to take into consideration the interest, if any, which the witness may have in the result of the trial, his conduct on the stand, his general appearance and demeanor before you, and whether or not it is such as convinces you that he is speaking the truth or otherwise": *People v. Dolan*, 96 Cal. 315, 31 Pac. 107.

## CHAPTER VI.

### INDISPENSABLE EVIDENCE.

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## § 1967. Indispensable Evidence.

The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.

### *Cross-references:*

Indispensable evidence defined, section 1836; indispensable evidence to prove treason and perjury, section 1968, and cross-references thereunder; to prove lost wills, section 1969, and cross-references thereunder; to prove revocation of will, section 1970, and cross-references thereunder; to prove estates or interests in real property, sections 1971, 1972, cross-references thereunder; under the statute of frauds, sections 1973, 1974, and cross-references thereunder.

### **Indispensable Evidence of Conspiracy.**

Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence. (Amendment approved April 9, 1880; Amendments 1880, p. 22. In effect April 9, 1880.; Penal Code, 1104.

### **Procuring Abortion—Enticing Woman for Prostitution.**

Upon a trial for procuring, or attempting to procure, an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of

twenty-five years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence: Pen. Code, 1108.

#### **False Pretenses.**

Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof, be in writing, subscribed by, or in the handwriting of, the defendant, or unless the pretense be proven by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property: Pen. Code, 1110.

#### **§ 1968. Proof of Perjury and Treason.**

Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

#### *Cross-references.*

One witness sufficient to prove any fact except perjury and treason, section 1844; jury to be instructed that they are not bound to decide in conformity with any declarations of any number of witnesses, which do not prove conviction, section 2061, subdivision 2; corroborative evidence defined, section 1839.

**Treason, How Proven.**

Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein: Pen. Code, 1103.

**Perjury, How Proven.**

Upon the trial of a defendant for the crime of perjury, where it appears that the alleged false testimony was given upon the trial of a defendant charged with stealing a cow, and consisted of a statement by the witness that he met the cow upon the highway going toward defendant's barn, but the requisite positive testimony of one witness that such meeting did not take place is lacking, the proof is insufficient to prove the perjury: *People v. Wells*, 103 Cal. 631.

Perjury must be proven by the testimony of two witnesses, or of one witness and corroborating circumstances, and the evidence, in each case of a defendant charged with perjury, must be weighed and measured by that test; and evidence of circumstances alone, without the positive testimony of a witness to facts absolutely incompatible with the innocence of the accused, is insufficient to justify a conviction: *People v. Porter*, 104 Cal. 415, 417.

Upon a charge of perjury against an insolvent debtor by a false oath to his petition and schedule, in fraudulently omitting money therefrom, proof that ten days after the filing of his petition in insolvency his wife, accompanied by himself, deposited to her credit a sum of money in a savings bank, without further evidence or testimony showing that the money deposited by the wife was the money of the husband at the time of filing his petition in insolvency, is insufficient to support a conviction of perjury: *People v. Porter*, 104 Cal. 415, 417.

Under section 1968 of the Code of Civil Procedure, requiring as indispensable evidence to a conviction

of perjury the testimony of two witnesses, or of one witness and corroborating circumstances, an insolvent debtor, accused of perjury in falsely swearing to a schedule of assets which omitted a particular promissory note, cannot be convicted upon mere evidence of his ownership of the note some months prior to the filing of his petition in insolvency, of his subsequent possession thereof, and of his admission to sundry persons that he had money or resources with which to pay his debts: *People v. Maxwell*, 118 Cal. 50, 51.

The rule laid down in section 1968 of the Code of Civil Procedure requiring direct evidence in cases of perjury means that there must be direct evidence only as to the falsity of the testimony charged to be perjury: *People v. Rodley*, 131 Cal. 240, 257.

An accomplice may be the one witness giving the direct and positive evidence required by section 1968 of the Code of Civil Procedure in cases of perjury, in connection with other corroborating circumstances, required by that section in case of any single witness; and the credibility of such accomplice and the weight of his testimony is a question for the jury in such cases as in others: *People v. Rodley*, 131 Cal. 240, 257.

### § 1969. Will Must be in Writing.

A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given. [Amendment approved March 24, 1874; Amendments 1873-74, p. 388. In effect July 1, 1874.]

#### *Cross-references:*

Secondary evidence defined, section 1830; wills and testaments excepted from rule as to acknowledgment

of private writings, section 1948; revocation of wills how proven, section 1970; judgment of order in respect to probate of a will is conclusive upon the will, section 1908, subdivision 1; wills come within the rule as to inadmissibility of parol evidence to vary terms of written agreement, section 1856, subdivision 2; original writing must be proven or loss accounted for, section 1937, and cross-references thereunder; how writings may be proven, section 1940, and cross-references thereunder; secondary evidence of contents of written instrument may be given on the trial, section 1870, subdivision 14; written instrument is best evidence of its existence and contents, section 1829; what constitutes secondary evidence of written instrument, section 1830; when secondary evidence may be given of contents of writing, section 1855, and cross-references thereunder.

#### **Testimony of Subscribing Witnesses Taken on Probating of Will.**

The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state: Code Civ. Proc., 1316.

#### **Nuncupative Will, How Proved.**

To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars;
2. It must be proved by two witnesses, who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect;
3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case actual contemplation, fear, or peril of death; or the decedent must have been, at the time, in expectation of immediate

death from an injury, received the same day: Civ. Code, 1289.

### **Testimony on Will Contests.**

If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them: Civ. Code, 1315.

### **Proof of Lost Will.**

On an application to have a lost will admitted to probate, under section 1339 of the Code of Civil Procedure, the provisions of the will must be clearly and distinctly proved by at least two credible witnesses: Estate of Kidder, 66 Cal. 487, 6 Pac. 326.

Whenever any will is lost or destroyed, the superior court must take proof of the execution and validity thereof and establish the same, notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony must be reduced to writing, and signed by the witnesses: Code Civ. Proc., 1338.

No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses: Code Civ. Proc., 1339.

Section 1339 of the Code of Civil Procedure, relative to the probate of a lost or destroyed will, is remedial in its nature, and is to be liberally construed, as applying to the probate of a mutilated will, some of the provisions of which have been destroyed: Estate of Camp, 134 Cal. 233, 66 Pac. 227.

The requirement that the destroyed provisions must be "clearly and distinctly proved by at least two credible witnesses," does not import that they shall reproduce the exact language of the testator; and if their testimony agrees respecting the substance of the destroyed provisions of the will, those provisions may be established, though the witnesses may differ in their remembrance of the exact language used: *Estate of Camp*, 134 Cal. 233, 66 Pac. 227.

An olographic will, destroyed in the lifetime of the testator, cannot be admitted to probate, if not "fraudulently destroyed." Such a will, if destroyed by a friend, in the presence of the testator, as being, in his expressed opinion, of no further use after the testator had, under the friend's advice, executed a type-written copy, signed by the friend as a witness, was not "fraudulently destroyed," within the meaning of section 1339 of the Code of Civil Procedure: *Estate of Johnson*, 134 Cal. 662, 66 Pac. 847.

### § 1970. Revocation of Will.

A written will cannot be revoked or altered otherwise than as provided in the Civil Code. [Amendment approved March 24, 1874; Amendments 1873-74, p. 388. In effect July 1, 1874.]

#### *Cross-references:*

Indispensable evidence of contents of will, section 1969, and cross-references thereunder; final judgment, when conclusive as to wills, section 1908; will is an agreement within the statute forbidding parol evidence to modify written agreement, section 1856.

A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will: Civ. Code, sec. 1296.

If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not re-

vive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished: Civ. Code, sec. 1297.

#### **Written Will, How Revoked.**

Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction: Civ. Code, 1292.

When a will is canceled or destroyed by any other person than the testator, the direction of the testator and the fact of such injury or destruction, must be proved by two witnesses: Civ. Code, 1293.

The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates: Civ. Code, 1295.

A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will: Civ. Code, 1296.

If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received: Civ. Code, 1298.

If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, un-



less provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received: Civ. Code, 1299.

The right of any person to execute a will, as well as the form in which the will must be executed, or the manner in which it may be revoked, are matters entirely of statutory regulation: *In re Comassi*, 107 Cal. 1, 5.

A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is revived by the death of her husband: Civ. Code, 1300.

A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession: Civ. Code, 1303.

### § 1971. Estates in Real Property.

No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance, or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

#### *Cross-references:*

Agreement for leasing for longer than one year invalid unless in writing, section 1973, subdivision 5; this section not to be construed to affect power of

testator to dispose of real property or to prevent trusts arising or being extinguished by implication or operation of law, section 1972; certificate of acknowledgment as proof of execution of evidence, section 1951.

See Jones on Evidence, sections 416-423.

As to the conveyance of interests in land, section 416.

The statute as affecting leases, section 417.

Proof of surrender of interests in land, section 418.

Surrender by operation of law, section 419.

Cancellation of instruments creating interests in land, section 420.

Trusts—How proved—Need not be created by writing, section 421.

The trust to be proved by writing, section 422.

Exceptions as to resulting trusts, section 423.

### **Trusts in Real Property, How Created.**

No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;

2. By the instrument under which the trustee claims the estate affected; or,

3. By operation of law: Civ. Code, 852.

An express trust in land cannot be established by evidence of the oral declarations of the alleged trustor respecting his purpose in executing the deed therefor, or of oral admissions of the alleged trustee relative to the title of the plaintiff in the land: *Smith v. Mason*, 122 Cal. 426, 427.

The mere fact that a deed was made from a father to his daughter, without consideration, is not sufficient to raise a presumption of fraud, nor to raise a resulting trust in favor of other children of the grantor: *Smith v. Mason*, 122 Cal. 426, 427.

### **Executed Parol Gift.**

There may be an executed parol gift of land: *Siddall v. Haight*, 132 Cal. 320, 322.

**Revocation.**

Certainly, one party to a written contract cannot at the time of its execution, or thereafter, destroy such written contract or deed by declaring in the absence of the party with whom he had contracted or to whom he had conveyed that his contract or deed was not intended to operate according to its tenor and effect: *Frink v. Roe*, 70 Cal. 296, 317.

**Reservations and Limitations by Parol.**

If land be conveyed by one tenant in common to his cotenant by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantee to hold a portion of the land in trust for the grantor or reconvey it. And in the absence of any wrongful means in securing the conveyance, no constructive or implied trust is created in favor of the grantor, from the fact of such parol agreement to hold in trust, and its subsequent breach by the grantee: *Barr v. O'Donnell*, 76 Cal. 469, 471.

When a conveyance reciting a consideration is made by a debtor to another for the purpose of hindering and defrauding his creditors, there is the strongest reason for a strict application of the statute of frauds, and a verbal agreement to reconvey the property will not create an express or resulting trust: *Hasshagen v. Hasshagen*, 80 Cal. 514, 518.

**Part Performance.**

A verbal contract for the erection of a dwelling-house on land belonging to an aged and infirm person, by one who, in consideration of its erection, and of the payment of one-half of all taxes and water rates, and of personal care for the infirm person in sickness, is entitled to occupy the house so erected for life, is a contract for the sale of a life estate, and does not create a lease or a tenancy at will. Such contract is taken out of the statute of frauds by part performance in the erection of the building and performance of the personal service required up to the time of a proceeding for unlawful detainer, so far as to constitute a defense to such proceeding: *Manning v. Franklin*, 81 Cal. 205, 207.

**What is an Interest in Realty.**

An absolute interest as tenants in common in a ditch and water right is an estate in real property; and an agreement by which such interest is to be acquired is within the statute of frauds, and cannot be proved, except by some note or memorandum thereof in writing: *Hayes v. Fine*, 91 Cal. 391, 398.

**Estates in Real Property, How Transferred.**

An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing: Civ. Code, 1091.

Mortgage being but a personal chattel, a parol trust may attach to the mortgage that the mortgagee shall hold it in trust in part for his own benefit, and in part for the benefit of another; and parol proof of such trust does not vary the terms of the written instrument, or violate the statute of frauds as to the time of performance of the contract. The beneficiary can enforce the mortgage as against subsequent lienholders in all respects as if made to him: *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641.

**§ 1972. Construction of Preceding Section.**

The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

*Cross-references:*

See cross-references under preceding section; pre-

sumption that trustee whose duty is to convey real property has actually conveyed, section 1963, subdivision 37.

**Sufficient Memorandum.**

A written memorandum describing the land sold, and stating that it was all sold to a purchaser named for value received, and signed by the vendor, with two sets of figures prefixed, without a dollar-mark, the first of which is shown by parol evidence to denote a total sum of money due from the vendor to the purchaser, of which the land was part payment, and the second a certain other sum which still remained due after the price of the land was deducted, and another memorandum, made at the same time, showing the same balance due to the purchaser, in figures, with the dollar-mark prefixed, and appending after the signature of the vendor a reference to each tract of land sold, with figures annexed, which were shown to denote the agreed price of each tract, and the sum of which corresponds to the difference between the sets of figures prefixed to the first memorandum, constitute, when taken together, sufficient memoranda to satisfy the statute of frauds; and parol evidence is admissible to explain the figures in such written memoranda: *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206.

**Payment, not Part Performance.**

The payment of the purchase money is not sufficient part performance to authorize the specific enforcement of an oral agreement to convey land: *Forrester v. Flores*, 64 Cal. 24, 26.

**Part Performance, What Is.**

Possession of a lot of land under a parol contract, for the sale thereof, the expenditure of money in its improvement, and partial payments of the purchase price, constitute part performance of the contract which takes it out of the statute of frauds, and entitles the vendee to a specific performance of the contract: *Day v. Cohn*, 65 Cal. 508, 509.

Where services were rendered by a married woman under an oral agreement with her employer that in

consideration for such services he would deed certain lands to her and her husband as a home during their lives, and the contract was fully performed on her part, and partly performed on the part of the employer by surrendering the possession and control of the lands to her and her husband, she could demand and enforce a specific performance of the contract as against the employer and as against his grantee, who must be deemed to have taken with notice of the rights of the possessors: *Hill v. Den*, 121 Cal. 42, 44.

### § 1973. Statute of Frauds.

In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 2794 of the Civil Code.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action,

or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

*Cross-references:*

Other sections of the statute of frauds, sections 1971, 1974; secondary evidence of contents of writing, sections 1830, 1829, 1837, 1855, and cross-references thereunder; parol evidence when admissible to explain writing, section 1856; execution of writings in general, how proven, section 1940, and cross-references thereunder.

Subdivision 2. Principal when bound by judgment against surety, section 1912.

Subdivision 4. Right to demand receipt for payment, section 2075; presumptions as to payment, section 1963, subdivisions 7, 9, 13.

Subdivision 5. Conveyance of estate of interest in real property must be in writing, section 1971; trust may arise by implication or operation of law section 1972; declarations of agent may be proven from principal, section 1870, subdivision 5.

See Jones on Evidence.

Subdivision 4, sections 431-433.

Sale of goods, section 431.

What the memorandum is to contain, sections 432, 433.

Subdivision 5, sections 417-419.

The statute as affecting leases, section 417.

Proof of surrender of interests in land, section 418.

Surrender by operation of law, section 419.

### **Auction Sales.**

When property is sold by auction, an entry made by the auctioneer, in his sale-book, at the time of sale, specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer, binds both the parties in the same manner as if made by themselves. (Amendment approved March 30, 1874; Amendments 1873-74, p. 244. In effect July 1, 1874.) Civ. Code, 1798.

### **Personal Liability of Executor Must be Expressed in Writing.**

No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized: Code Civ. Proc., 1612.

### **Statute of Frauds.**

The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged or by his agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof;
2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of this code;
3. An agreement made upon consideration of marriage, other than a mutual promise to marry;



4. An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars, unless the buyer accept or receive part of such things in action, or pay at the time some part of the purchase money; but when a sale is made at auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kinds of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or for an interest therein; and such an agreement, if made by an agent of the party sought to be charged is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged;

6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission: Civ. Code, 1624.

#### **Statute of Frauds—Sale of Personalty.**

No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid unless:

1. The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent; or,

2. The buyer accepts and receives part of the things sold, or when it consists of a thing in action, part of the evidences thereof, or some of them; or,

3. The buyer, at the time of sale, pays a part of the price. (Amendment approved March 30, 1874; Amendments 1873-74, p. 243. In effect July 1, 1874.) Civ. Code, 1739.

An agreement to manufacture a thing, from materials furnished by the manufacturer, or by another person, is not within the provisions of the last section: Civ. Code, 1740.

A contract for the sale of mining stocks for a sum not less than three hundred thousand dollars is within the statute of frauds, and must be in writing, if the purchaser has not received any part of the stock

or paid any part of the price: *Mattingly v. Pennie*, 105 Cal. 514, 519.

**Guaranty, When Must be in Writing.**

Except as prescribed by the next section, a guaranty must be in writing, and signed by the guarantor; but the writing need not express a consideration: Civ. Code, 2793.

A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation, in whole or in part, in consideration of such promise;

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation, in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety;

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation, or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person;

4. Where a factor undertakes, for a commission, to sell merchandise and guarantee the sale;

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument: Civ. Code, 2794.

A third person who writes his name on the back of a non-negotiable note becomes a guarantor thereof, whether the indorsement is made before or after delivery; and, under the codes, it is not necessary that the consideration of the guaranty be expressed in writing, in either case: *Rogers v. Schulenburg*, 111 Cal. 281, 285.

**Realty—Escrow.**

On the 8th of December, 1883, the plaintiff and certain of the defendants entered into a contract for the sale of the land in controversy. In pursuance of the contract, the defendants executed a deed of the land to the plaintiff, and deposited the same with a third person, to be by him delivered to the plaintiff upon the payment of the purchase price. No time for the payment was fixed by the contract. The plaintiff immediately took possession of the property, by direction of the grantors, and on the 11th of December, 1883, tendered the purchase price to the custodian of the deed. Held, that the deed was an escrow, and that the tender of the purchase price was made within a reasonable time, and was sufficient without being kept good: *Cannon v. Handley*, 72 Cal. 133, 144.

A contract to convey land in payment of the indebtedness of the vendor, unless otherwise paid by a certain date, is binding upon the vendor, from its delivery to a third person in escrow, without the signature of the vendee or any contract in writing from him. If the vendee agrees verbally to the terms of the written agreement to convey, he is estopped from enforcing the indebtedness until the time fixed by the agreement: *McDonald v. Huff*, 77 Cal. 279, 282.

**Realty—Insufficient Memorandum.**

When a contract of sale of real estate is evidenced by three telegrams—one from the agent of the owner of the property communicating a verbal offer, without naming the proposed purchaser; a second from the owner to his agent, telling him to accept the offer; and a third from the agent, addressed to the proposed purchaser by name, simply notifying him of the contents of the telegram from the owner, but

not otherwise indicating who the purchaser was—the contract is too uncertain as to the purchaser to be enforced, or to sustain an action for damages for its breach: *Breckenridge v. Crocker*, 78 Cal. 529, 534.

**Realty—Not within the Statute.**

An oral agreement, made at the time of the transfer of real estate, and in consideration of the transfer, that upon a sale of the property by the grantee there should be deducted from the price of the resale the amount of advances made by the grantee to redeem the property from a sale under foreclosure against the grantor, and the amount of any further advances made by the grantee for taxes and assessments, with interest on all advances at a specified rate, and that the residue of the proceeds from the sale should be paid to the grantor, is not an agreement for the sale of real property, or of an interest therein, within the statute of frauds, but is merely for the payment of money agreed on as the consideration of the conveyance, which is not within the statute; and assumpsit will lie for the surplus proceeds resulting from a resale, under the terms of the agreement: *Byers v. Locke*, 93 Cal. 493, 495.

**§ 1974. Representation as to Credit of Third Person.**

No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

*Cross-references:*

Indispensable evidence defined, section 1836; other statute of frauds, sections 1971, 1972, 1973; opinion as to handwriting may be given on trial, section 1870; when handwriting difficult to decipher expert evidence may be given, section 1863; handwriting how proven, sections 1943, 1944, 1945.

## CHAPTER VII.

### CONCLUSIVE OR UNANSWERABLE EVIDENCE.

§ 1978. Conclusive or unanswerable evidence.  
Evidence of notice on application for letters  
of administration.

§ 1978. Conclusive or Unanswerable Evidence.  
No evidence is by law made conclusive or un-  
answerable, unless so declared by this code.

#### *Cross-references:*

Conclusive evidence defined, section 1837; conclu-  
sive presumptions, section 1962; judgments and orders  
when conclusive, section 1908; recitals in statutes  
when conclusive, section 1903.

#### **Evidence of Notice on Application for Letters of Administration.**

An entry in the minutes of the court that the re-  
quired proof was made and notice given shall be con-  
clusive evidence of the fact of such notice: Code  
Civ. Proc., 1376.

## TITLE III.

### OF THE PRODUCTION OF EVIDENCE.

Chapter I. By Whom to be Produced, §§ 1981, 1982.

II. Means of Production, §§ 1985-1997.

III. Manner of Production, §§ 2002-2054.

## CHAPTER I.

### BY WHOM TO BE PRODUCED.

§ 1981. Burden of proof.

Burden of proof in will contest.

Want of consideration—Burden of proof.

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Criminal law—Proof of prosecution need not be absolute.

Criminal law—Circumstantial evidence.

Criminal law—Insanity.

Criminal law—Character.

Criminal law—Plea of self-defense.

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Criminal law—Forgery.

Criminal law—Burglary.

§ 1982. Alteration of instruments.

Alteration is criminal offense.

Alterations of instruments.

Cancellation may be explained.

§ 1981. Burden of Proof.

The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

*Cross-references:*

Each party must prove his own affirmative allegations, section 1869; proof defined, section 1824; proof must correspond with the pleadings, section 1868; negative allegations, section 1869.

See Jones on Evidence, section 178. How affected by form of issue—Whether affirmative or negative.

**Burden of Proof in Will Contest.**

Upon the contest of a will, the burden is upon the contestant to prove the allegations of undue influence and unsoundness of mind: Estate of Motz, 136 Cal. 358, 69 Pac. 294.

**Want of Consideration—Burden of Proof.**

The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it: Civ. Code, 1615.

**Homicide—Mitigating Circumstances—Burden.**

Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof

on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable: Pen. Code, 1195.

#### **Affirmative of the Issue.**

In ascertaining who has affirmative of issue, matters of substance, and not matters of form, should control. The fact that the traverse is in an affirmative, instead of a negative, form is immaterial: *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871.

Burden is cast on plaintiff of proving every material allegation in the complaint which is denied in the answer: *Siter v. Jewett*, 33 Cal. 92. Cited 17 Cal. 471, 30 Pac. 64.

Burden of producing preponderance of evidence is upon party who has affirmative of the issue, and remains upon him throughout the trial. It is a different thing from the burden of making or meeting a prima facie case, which latter burden may shift back and forth in the course of the trial: *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871. Cited 21 Nev. 349, 31 Pac. 642.

Failure of defendant to deny charges in complaint, making out a prima facie case for the plaintiff, will throw the onus on defendant of proving his affirmative allegations: *Thompson v. Lee*, 8 Cal. 275.

Affirmative matter alleged by defendant in his answer must be proved: *Osborn v. Hendrickson*, 8 Cal. 31.

Presumption is against party who has burden of proof, and, if no evidence be introduced, the finding should be in accordance with such presumption: *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700.

He who avers fact in excuse of his own malfeasance must prove it: *Le Franc v. Hewitt*, 7 Cal. 186; *Finn v. Vallejo St. Wharf Co.*, 7 Cal. 253.

#### **Burden of Proof—Want of Probable Cause.**

Where there has been a change of beneficiary, the burden of proof is upon the first beneficiary to prove such existing equities under a contract as will protect such first beneficiary against the change, and, where



there is conflict of evidence, the findings of court against the existence of equities in favor of the first beneficiary will not be disputed upon appeal: *Jory v. Supreme Council American Legion of Honor*, 105 Cal. 20, 45 Am. St. Rep. 17, 38 Pac. 524.

In an action for malicious prosecution, the burden is upon the plaintiff to show affirmatively that there was a want of probable cause: *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 634.

### **Burden of Proof—Negligence.**

It is the duty of a railroad corporation to afford a reasonable time for passengers to alight from its cars at the station to which it has assumed to carry them, and if a passenger is injured while attempting to alight at such station, by reason of the sudden and unannounced starting of the train, the burden is thrown upon the company of showing that the injury was not the result of its own act or negligence: *Raub v. Los Angeles Terminal Ry. Co.*, 103 Cal. 473, 37 Pac. 374.

A street railway company, as a carrier of passengers, is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care; and in case of collision of a street-car with a railway train, to the injury of its passengers, a presumption of negligence arises which throws upon the street-railway company the burden of showing that the injury was sustained without any negligence on its part: *Osgood v. Los Angeles etc. Co.*, 137 Cal. 230, 233.

Where a common carrier of goods is sued on his contract of carriage for a failure to safely carry and deliver the goods at the place of consignment, and sets up in defense that after the arrival of the goods they were stored in a warehouse, and were there destroyed by fire without his negligence or fault, the burden of proving this defense, including the loss by fire without negligence or fault on his part, is on him: *Wilson v. California C. R. R. Co.*, 94 Cal. 166, 175.

**Burden of Proof—Showing Bona Fides.**

Upon proof, by the defendant, of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder, which he may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business; and when he has done this, unless the evidence shows that the note was taken by plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show that the plaintiff took the instrument with notice of the defendant's equities: *Eames v. Crozier*, 101 Cal. 260, 35 Pac. 873.

One who sets up the defense of subsequent purchase in good faith without notice of the plaintiff's equity, must, as a general rule, affirmatively show a purchase for value, and that the purchase money was paid before notice: *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1010.

The burden of proving a sufficient consideration for a note, and that it was not given under undue influence, is not thrown upon the plaintiff in an action thereon merely because it appears that plaintiff and defendant were husband and wife at the time the note was given: *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189.

The creditor attacking the sale as fraudulent must first show fraudulent intent in the vendor, and the burden of proof is then on the purchaser to show a valuable consideration, and when this is shown the burden again shifts, and the creditor must show knowledge of the fraudulent intent of the vendor on the part of the vendee: *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402.

Where fraud or illegality in the inception of the note in suit is shown, the burden is cast upon the indorsee to show that he purchased the note before maturity or from an innocent indorsee, for value, in the usual course of business, and when this is done, unless the evidence shows that the note was taken by plaintiff under circumstances creating the pre-

sumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show that plaintiff took the note with notice of the defendant's equities: *Sinkler v. Siljan*, 136 Cal. 356, 68 Pac. 1024.

A transfer by a retail merchant of his entire stock in trade is not in the usual and ordinary course of business, and upon proof of such transfer by an insolvent debtor, the burden of proof upon the question of fraud is shifted upon the purchaser to show that he was not aware of the intent of the vendor to make a fraudulent preference forbidden by the insolvent act: *Tapscott v. Lyon*, 103 Cal. 297, 37 Pac. 225.

The answer, having averred that the original interest of the defendant in the policy was under a mortgage thereof to him by the insured, the burden of proof was upon him to show that the subsequent transaction, by which he claimed to have become the owner of it by transfer, was a fair transaction, that no advantage was taken of the necessities of the mortgagor, and that the consideration paid therefor was adequate, or what the policy was worth: *Clark v. Fast*, 128 Cal. 422, 61 Pac. 72.

#### **Miscellaneous Cases—Burden of Proof.**

In an action by the plaintiff, to recover the agreed compensation for collecting the claims, the burden of proof is on the defendant of showing that the plaintiff had abandoned the collection of the claims, either expressly or by such lack of effort as would reasonably show an abandonment: *Craddock v. O'Brien*, 104 Cal. 217, 37 Pac. 896.

#### **Notice.**

In an action to declare a trust, and compel a conveyance of the trust property to the beneficiaries, the complaint alleged that the defendants held the legal title by conveyance from the original trustee, and that they took with knowledge of the plaintiff's equities. At the time of the purchase by the defendants, there was nothing of record to put them on inquiry as to the rights of the plaintiffs. Held, that the bur-

den of proving notice to the defendants was upon the plaintiffs: *Wyrick v. Week*, 68 Cal. 8, 10.

#### **Possession for Statutory Period.**

There is no presumption that any portion of the land covered by the Van Ness ordinance was or was not in the actual possession of anyone during the period provided for in the ordinance; but, in any legal proceeding in which the fact whether a particular parcel of land was or was not then held in actual possession becomes material, it must be established by that party who relies upon the fact as an affirmative issue in support of his claim or defense: *Goodwin v. Scheerer*, 106 Cal. 690, 697.

#### **Insanity in Civil Cases.**

Where the husband of the testatrix contested her will upon the alleged ground of insane delusions on her part that he was unfaithful to her, was attempting to poison her, and was conspiring with others to place her in an insane asylum, the burden was upon him to prove the existence of these delusions, and not only that they had no foundation in fact, but also that there was no evidence of any facts brought to her knowledge from which she might form a belief, however unreasonable and perverse it might be, in the truth of her charges. He must present evidence sufficient to overcome the presumption that she was sane when she made the will: *Estate of Scott*, 128 Cal. 57, 62.

#### **Insanity in Criminal Cases.**

The doctrine of reasonable doubt does not apply to the question of the insanity of the defendant; but the burden is on the defendant to show by a preponderance of evidence that he was insane at the time of the alleged homicide: *People v. Ward*, 105 Cal. 335, 38 Pac. 945.

#### **Criminal Law—Reasonable Doubt Defined.**

A reasonable doubt of the guilt of a person on trial for a criminal offense is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condi-

tion that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it: *People v. Ashe*, 44 Cal. 288.

An instruction as to reasonable doubt, given in the approved language of Chief Justice Shaw, is free from error, and it is the better practice to confine the instruction on that subject to that language, and not to run the risk of error by complex variations of verbiage: *People v. Fellows*, 122 Cal. 233.

It is error to refuse an instruction requested by the defendant defining what is a reasonable doubt in the language adopted by Chief Justice Shaw in the *Webster* case and approved by this court; and it also error to instruct the jury that a reasonable doubt must be based upon common sense: *People v. Paulsell*, 115 Cal. 6.

An instruction telling the jury that a reasonable doubt is a "fair doubt" is not properly an explanation of reasonable doubt, but the jury could not conclude that a proper instruction as to reasonable doubt is taken back by the meaningless phrase: *People v. Hubert*, 119 Cal. 216.

Where an instruction on the subject of reasonable doubt is refused, an instruction given to the effect that it "means precisely what the words import—a fair doubt growing out of the evidence, or want of evidence, in the case, based upon reason and common sense," and that "it is such a doubt as may leave the minds of the jury, after they have considered all the evidence in the case, in that state that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge," though perhaps not so full and clear as the oft approved definition of Chief Justice Shaw, is nevertheless free from error: *People v. White*, 116 Cal. 17.

Where the ordinary definition of reasonable doubt is correctly given, the omission to tell the jury that the guilt of the defendant should be inconsistent with every other rational hypothesis is not erroneous, in the

absence of a request that it be given: *People v. Brittan*, 118 Cal. 409.

Where the court, after giving the usual and accepted definition of reasonable doubt, stated to the jury that a reasonable doubt "is the doubt that arises out of a consideration of the testimony; a doubt that is supported by reason, and not by mere conjecture or idle supposition, irrespective of evidence in the case," and that they were to be "morally satisfied beyond a reasonable doubt—not wholly satisfied, absolutely satisfied, and beyond all possible doubt—but morally satisfied beyond all reasonable doubt," the phrase, "not wholly satisfied," cannot be misleading, in the context in which it occurs, nor could the instruction be understood as directing the jury to disregard their own judgment founded upon their experience in life: *People v. Ross*, 115 Cal. 233.

A correct instruction upon the subject of reasonable doubt is not rendered erroneous or misleading by adding thereto the sentence, "A juror is not at liberty to disbelieve as a juror what he believes as a man": *People v. Worden*, 113 Cal. 569.

In an instruction requested to the effect that the jury must be convinced of the guilt of the defendant "beyond all reasonable doubt," a modification by the change of "all" to "a" though without apparent reason is harmless: *People v. Burns*, 121 Cal. 529.

#### **Criminal Law—Reasonable Doubt—Examples.**

Proof beyond reasonable doubt is necessary to establish a fact against a prisoner; but preponderating proof, proof necessary to satisfy a jury of a fact, is sufficient to establish a fact in his favor: *People v. Milgate*, 5 Cal. 127.

If a person is killed by a bullet fired from a pistol, and two persons each at the same time fire loaded pistols at him, and one of the persons who fired is on trial for murder, and there is no evidence of a conspiracy between the two persons who fired, and the jury are in doubt as to which shot killed the deceased, the defendant is entitled to the benefit of that doubt: *People v. Woody*, 45 Cal. 289.

The jury must be satisfied beyond reasonable doubt that every fact essential to constitute the offense charged has been proved: *People v. Morino*, 53 Cal. 67.

An unlawful act is presumed to have been committed with unlawful intent, but the presumption may be rebutted and overcome when a reasonable doubt is raised as to the defendant's guilt, and if a reasonable doubt is raised, the burden or onus is lifted, and the jury must presume an absence of such criminal intent: *People v. Ah Gee Yung*, 86 Cal. 144.

The rule requires only a belief in the minds of the jurors to that degree of moral certainty which excludes all reasonable doubt of the guilt of the accused; and an instruction that there must be a conviction in their minds so perfect, complete and unconditional as to exclude the possibility of a doubt, is properly refused: *People v. Smith*, 105 Cal. 676.

An instruction that "an unlawful killing must be proven by the state before the defendant can be convicted of any offense, whether murder or manslaughter," is not erroneous in not defining the degree of proof necessary to authorize conviction, and in leaving the jury to infer that a mere preponderance in the evidence would be sufficient, when it appears that the court elsewhere repeatedly stated the principal that guilt must be established beyond a reasonable doubt: *People v. Brittan*, 118 Cal. 409.

Where there is nothing in the evidence for the prosecution to take the case out of the rule declared in section 1105 of the Penal Code that "the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable," and where the court has properly instructed the jury upon the subject of the burden of proof, and that it is sufficient if the defendant raises a reasonable doubt of his justification, it is proper to refuse an instruction asked by the defendant to the effect that the

burden of proving circumstances that justify the killing of the deceased by the defendant does not rest upon the defendant: *People v. Newcomer*, 118 Cal. 263.

Upon the trial of a defendant accused of murder, an instruction to the effect that, up to the moment of killing, the prosecution must make out its case beyond a reasonable doubt but, when the killing is proved, the burden of proof changes, and the defendant must show by a preponderance of evidence, circumstances in mitigation, or to excuse or justify the homicide, is prejudicially erroneous, when it appears that the defendant personally testified to circumstances of justification though his evidence was entirely uncorroborated: *People v. Marshall*, 112 Cal. 422.

An instruction as to what verdict should be rendered, where there is a reasonable doubt as to the degree of the crime, would better be given in the statutory language of section 1097 of the Penal Code, which provides that "when it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only"; but where an instruction, in a case of homicide, states that the jury "may, if the evidence warrants it, find the defendant guilty of murder in the first degree, or murder in the second degree or of manslaughter," and that should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they will give the defendant the benefit of the doubt, and acquit him of the higher offense," the instruction is not misleading, and does not tell the jury merely to acquit of the highest of the three offenses named, and it is not to be presumed that the jury understood the word "higher" in any other than its grammatical sense as denoting one of two things: *People v. Newcomer*, 118 Cal. 263.

Upon the trial of a defendant charged with murder where the court has given a full and correct instruction upon the subject of reasonable doubt it is not erroneous, or objectionable as being argumentative



in form, to instruct the jury that "the doubt which acquits the defendant on trial on a charge of crime must be a reasonable doubt in the sense mentioned and no other": *People v. Winters*, 125 Cal. 325.

An instruction requested that "if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it was the duty of such juror not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of guilty," is a correct statement of the duty of a juror, and should have been given: *People v. Dole*, 122 Cal. 486.

An instruction requested by the defendant, that the facts tending to prove the guilt of the defendant must be established in the minds of the jury beyond a reasonable doubt—"that is, it must entirely satisfy" them of the guilt of the decedent before they could convict—and that if they were not "entirely satisfied" they should acquit him, though it might have been given as requested, is not rendered erroneous or misleading by striking out the word "entirely" therefrom, and giving it as thus modified: *People v. Kiser*, 119 Cal. 456.

An instruction that "it is sufficient if he (the defendant) demonstrate to your understanding by testimony given, by inferences correctly and properly drawn from the whole testimony in the case, that notwithstanding the burden so cast upon him, there still exists in your mind a reasonable doubt of his guilt," though unhappily expressed in the use of the word "demonstrate," is not for that reason ground for reversal, as, taken in connection with the context, the jury could not have understood the instruction as requiring anything more than the raising of a reasonable doubt: *People v. Newcomer*, 118 Cal. 263.

An instruction that "in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, he is entitled to an acquittal," is not objectionable: *People v. Wynn*, 133 Cal. 72.

An instruction as to reasonable doubt which complies in substance with the definition thereof laid down

by this court is not objectionable: *People v. Davis*, 135 Cal. 162.

An instruction that if the jury are morally convinced of the guilt of the defendant, and fully satisfied of the truth of the charge, they are convinced beyond a reasonable doubt, and should convict the defendant is not perfectly sound, and should not be given. An instruction as to reasonable doubt should be confined to the approved definition declared unobjectionable by this court: *People v. Schoedde*, 126 Cal. 373.

An instruction "that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong," and that if the jury "have a reasonable doubt as to which of said conclusions the chain of circumstances leads to, they should acquit the defendant, is properly refused, as both of such opposing conclusions might lead to defendant's guilt: *People v. Clark*, 130 Cal. 642.

A requested instruction to the effect that it is the duty of each juror to decide the question of reasonable doubt for himself "and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinions of others," is properly refused: *People v. Rodley*, 131 Cal. 240.

Where, in addition to instructions given, that the burden of proof is on the prosecution and that the jury must be entirely satisfied of defendant's guilt before they can convict, they are instructed that "if, upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty," etc., the charge is the equivalent of a requested instruction that no mere preponderance of evidence would warrant a conviction, and it is not error to refuse both: *People v. Rodley*, 131 Cal. 240.

Where the rules as to the degree of proof required in criminal cases and the doctrine of reasonable doubt,

were fully stated and explained to the jury, a requested instruction that, "in weighing the evidence to determine whether there is a reasonable doubt of the defendant's guilt, you have the right to consider that innocent men have been convicted, and to consider the danger of convicting innocent men," was properly refused. Such requested instruction contains matter more appropriate to the arguments of counsel than to the instructions of the court: *People v. Findley*, 132 Cal. 301.

**Criminal Law—Proof of Prosecution Need not be Absolute.**

It is not necessary that the evidence for the prosecution in a criminal case should show that the innocence of the defendant is impossible in order to justify the jury in finding him guilty, but it is enough if such evidence demonstrate the guilt of the defendant beyond a reasonable doubt: *People v. Brotherton*, 47 Cal. 388.

It is not sufficient to raise a doubt, even though it be a reasonable doubt of the fact of extenuation, simply because it is no proof of the fact: *People v. Milgate*, 5 Cal. 127.

**Criminal Law—Circumstantial Evidence.**

In order to convict on circumstantial evidence, the evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony: *People v. Padillia*, 42 Cal. 535.

An instruction that, "in order to convict, the circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony," commented on and criticised. Per McFarland, J.: *People v. Sansome*, 84 Cal. 449.

The court instructed the jury: "In order to convict upon circumstantial evidence, the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. The circumstances ought to be of such a nature

as not to be reasonably accounted for on the supposition of the defendant's innocence, but perfectly reconcilable with the supposition of defendant's guilt''; and also instructed the jury that it must be satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt before they could find him guilty. Held, there is no substantial conflict in these instructions: *People v. Hardisson*, 61 Cal. 378.

Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other reasonable hypothesis consistent with the proof: *People v. Shuler*, 28 Cal. 490.

When the evidence against the accused is entirely circumstantial and is conflicting in relation to a material fact going to make up the chain of circumstances, an instruction to the effect that "if the jury entertain a reasonable doubt as to the existence of such fact, the defendant must be acquitted," is pertinent and appropriate, and should be given: *People v. Phipps*, 39 Cal. 326.

Where independent facts and circumstances are relied upon to identify the accused as the person committing the offense charged, each essential independent fact in the chain or series of facts relied upon to create a presumption of guilt must be established to a moral certainty or beyond a reasonable doubt: *People v. Phipps*, 39 Cal. 326.

When the jury has been properly instructed, upon a trial for homicide, that every link in a chain of circumstances necessary to a conviction from circumstantial evidence must be established by the people to a moral certainty, and beyond all reasonable doubt, it is not error to refuse to instruct them as to particular circumstances, it being for the jury to decide whether or not any special piece of evidence or circumstances was a necessary link in the chain: *People v. Ah Jake*, 91 Cal. 98.

An instruction to the jury in a criminal proceeding, that "if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore, if, in such a

case, you have any reasonable doubt as to which of said conclusions the chain of circumstances leads a reasonable doubt would be thereby created, and you should give the defendant the benefit of the doubt, and acquit him," states the law correctly: *People v. Dolan*, 96 Cal. 315.

To warrant the inference of legal guilt from circumstantial evidence, a conviction in the minds of the jury to a moral certainty and beyond a reasonable doubt, arising from the evidence of the defendant's guilt, is sufficient and an absolute or mathematical demonstration of guilt is not required: *People v. Bellamy*, 109 Cal. 610.

An instruction pointing out generally what constitutes direct or positive evidence, and that there is another kind of evidence called circumstantial, "where it is sought to convict a person by a chain of circumstances sufficient in themselves to establish the guilt of the party beyond a reasonable doubt," is not erroneous for omitting further to define circumstantial evidence, if the court was not asked to define it: *People v. Hiltel*, 131 Cal. 577.

#### **Criminal Law.—Insanity.**

Insanity, when relied upon as a defense in a criminal case, is to be established by the prisoner by preponderating proof. It is an issue upon which he holds the affirmative, and he must establish not only the fact of insanity, but insanity arising from such a cause as in point of law amounts to a defense: *People v. Bell*, 49 Cal. 485.

Upon the trial of a defendant charged with murder an instruction to the jury that the burden was upon the defendant to prove the defense of insanity by a preponderance of evidence is not prejudicially erroneous where it appears that the defendant admitted being guilty of the crime of murder, and claimed as the sole defense that he had inherited from an insane mother, an impaired mentality, which had been further weakened by the use of alcoholic liquors, and that his mental condition was such at the time of the homicide that he could not have entertained a malice in the shooting, and should not be found guilty of

murder in the first degree, or at least should not be subjected to the death penalty, and it further appearing that the jury was charged to give him the benefit of every reasonable doubt as to all other matters, including his defense, and that as to such matters he was not required to prove them by a preponderance of evidence: *People v. Eubanks*, 86 Cal. 295.

In an instruction the court in effect charged the jury that where insanity is relied upon it must be clearly established by satisfactory proof. Held, this was in effect to instruct the jury that the defense of insanity should at least be proved beyond a reasonable doubt; this was error: *People v. Wreden*, 59 Cal. 392.

The rule that it is sufficient to raise a reasonable doubt as to the defendant's guilt does not apply to the defense of insanity: *People v. Travers*, 88 Cal. 233.

An instruction asked by defendant on a trial for murder to the effect that, if the evidence created a reasonable doubt in the minds of the jury, as to the sanity of the defendant at the time he committed the act, he should be acquitted, was properly refused: *People v. Myers*, 20 Cal. 518.

In a criminal case, if the defendant relies upon insanity as a defense, proof beyond a reasonable doubt is not required, but the burden of proof is cast upon him, and his insanity must be established by such a preponderance of evidence that, if the single issue of the sanity or insanity of the defendant was submitted to the jury in a civil case, they would find that he was insane: *People v. Coffman*, 24 Cal. 230.

In one of the instructions of the court the jury were told that if they entertained "a reasonable doubt of the insanity of the person he must be acquitted," and in another that it was not sufficient that they "should merely entertain a reasonable doubt as to his sanity," and in a third that insanity "is not proved by raising a doubt whether it exists or not." Held, these instructions are clearly contradictory: *People v. Wreden*, 59 Cal. 392.

On the trial of an indictment the court instructed the jury in substance that insanity must be proved be-

yond a reasonable doubt, and in that connection read to the jury a decision of this court to the effect that it is sufficient if insanity be proved by a preponderance of evidence. Held, that the charge was contradictory and erroneous: *People v. Messersmith*, 57 Cal. 575.

The doctrine of reasonable doubt does not apply to the question of insanity of the defendant; but the burden is on the defendant to show by a preponderance of evidence that he was insane at the time of the alleged homicide: *People v. Ward*, 105 Cal. 335.

An instruction requested that if the jury "have a reasonable doubt of the sanity of the defendant at the time of the commission of the homicide, they must acquit him," is properly refused, a reasonable doubt as to a defendant's insanity not being sufficient to warrant an acquittal: *People v. Barthleman*, 120 Cal. 7.

Where the only defense is one of insanity, and there is no conflict of evidence as to the commission of the homicide by the defendant, the defendant cannot be prejudiced by refusing to give an instruction that if the evidence points to two conclusions, one consistent with the defendant's guilt, and the other consistent with his innocence the jury are bound to reject the one of guilt and adopt the one of innocence and acquit the defendant, especially where the principle sought to be stated was included in other parts of the instructions; and an instruction that if one set or chain of circumstances leads to two opposing conclusions, one of guilt and the other of innocence, and that if the jury had a reasonable doubt as to which of such conclusions the chain of circumstances leads, the defendant must be acquitted, is properly refused as confusing, and because a reasonable doubt as to the insanity of the defendant is not sufficient to make out that defense: *People v. Barthleman*, 120 Cal. 7.

#### **Criminal Law—Character.**

An instruction to the effect that the good character of the defendant for peace and quietness, if proved to the satisfaction of the jury, is to be considered in connection with the other facts of the case, and kept in

view in all their deliberations, and that they are to acquit the defendant if they have a reasonable doubt of his guilt in view of all the evidence, but that if the evidence convinces them beyond a reasonable doubt of his guilt, they must so find, notwithstanding his good character, is correct, and does not imply that the evidence of good character is not to be considered in determining the question of guilt: *People v. Mitchell*, 129 Cal. 584.

#### **Criminal Law—Plea of Self-Defense.**

An instruction to the effect that a defendant charged with murder cannot be acquitted upon his plea of self-defense, unless the jury "believe" from the evidence that at the time of firing the fatal shot the defendant honestly believed that his life was in danger and that he was about to receive great bodily injury from the deceased, is erroneous, as eliminating the right of the defendant to an acquittal if the evidence create a reasonable doubt as to whether he acted in self-defense: *People v. Scott*, 123 Cal. 434.

#### **Criminal Law—Proof of Alibi.**

A defendant accused of felony, who has introduced evidence tending to prove an alibi, is not required to prove it, by a preponderance of evidence, or to the satisfaction of the jury, but it is sufficient if, upon the whole evidence relating to that subject a reasonable doubt is raised as to the guilt of the defendant; and it is erroneous to instruct the jury that an alibi, "when satisfactorily proven, is a good defense in law," and that if the jury "believe from all the evidence" introduced before them that the defendant "was not present at the time it was alleged or proven that the crime was committed, and therefore could not have committed the crime charged in the information, and did not aid or abet in its commission," then they should find him not guilty: *People v. Roberts*, 122 Cal. 377.

A statement in an instruction upon the subject of alibi, that "such a defense is as proper and legitimate, if proved, as any other defense," is not strictly correct. An alibi is not matter of defense;



and the words, "if proved," standing alone, would be misleading. But where such statement is immediately followed by the statement to the jury that if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was in some other place when the crime was committed or not present at the time and place of its commission, they should give him the benefit of the doubt and acquit him, the instruction as a whole is not misleading: *People v. Winters*, 125 Cal. 325.

An instruction requested by the defendant upon the subject of alibi, which assumes to give defendant the benefit of any doubt raised omitting the qualification of reasonable doubt, is properly refused: *People v. Winters*, 125 Cal. 325.

#### **Criminal Law—Forgery.**

An instruction based upon evidence of the defendant's that the draft described in the information was genuine, to the effect that he is not required to establish that fact beyond a reasonable doubt, or by a preponderance of evidence, but that if the evidence is such as to create a reasonable doubt as to whether the signature to the alleged draft was a forgery, the jury should give defendant the benefit of the doubt, and find him not guilty, should be given: *People v. Sanders*, 114 Cal. 216.

Where it appears that there is no theory on which the defendant could have been convicted, if the check was not raised as charged, a requested instruction to the effect that if the jury entertained a reasonable doubt as to whether or not the check in question had been raised, it would be their duty to acquit, is correct and should have been given: *People v. Dole*, 122 Cal. 486.

#### **Criminal Law—Burglary.**

Changes made in the instructions requested by the defendants that guilt must be proven "beyond all reasonable doubt," by inserting the word "a" in the place of "all," and that "possession of stolen property . . . . is not sufficient to warrant a conviction," by inserting the word "mere" beyond the word

“possession,” are immaterial and without prejudice to the defendants: *People v. Ashmead*, 118 Cal. 508.

A charge to the jury upon the trial of an accusation of burglary with an attempt to commit larceny, in reference to the possession of stolen goods, which at the outset showed that it was based hypothetically upon the fact of such possession being established beyond a reasonable doubt, does not proceed to charge the jury upon matters of fact, because such hypothesis is not repeated in the subsequent discussion of the effect of evidence of such possession, and as to when it is to be considered as a circumstance in connection with other circumstances in the case in arriving at a verdict: *People v. Neber*, 125 Cal. 560.

### § 1982. Alteration of Instruments.

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.

#### *Cross-references:*

Execution of writings in general, section 1940, and cross-references thereunder; order of proof rests in discretion of court, section 2042; preliminary facts to admission of evidence are to be decided by the court, section 2102.

See *Jones on Evidence*, section 579. Presumption in case of alterations—English rule—Conflicting views in the United States.

**Alteration is Criminal Offense.**

Every person who, upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged, or fraudulently altered or antedated, is guilty of felony: Pen. Code, 132.

Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony: Pen. Code, 134.

**Alterations of Instruments.**

Where the plaintiff offered in evidence his books of account, together with his own testimony in explanation of certain alterations and suspicious circumstances existing upon the face of the books, held, that the testimony of the plaintiff and the books were not admissible; and that such suspicious circumstances should be explained by disinterested testimony: *Caldwell v. McDermit*, 17 Cal. 464.

An entry in an account-book offered in evidence was "June 30, 1859, P. W. Sterling, credit, by cash, one hundred and thirty-five dollars." A witness for Meyers, the party keeping the book, testified that in October, 1859, Meyers altered this entry by crossing with ink the word "by," and making it read "to," and changing the word "credit," and making it read "debtor"; and that this was done without the knowledge or consent of Sterling. Held, that in the absence of all other evidence explaining the original entry and the alteration, the court will presume that at the time the entry was made it was according to the fact; and hence that Sterling is entitled to a credit of one hundred and thirty-five dollars: *Sheils v. West*, 17 Cal. 324.

Where a party produced in evidence a deed, the date of which appeared to have been changed to one day subsequent to its original date, but by whom or where, it did not appear, the court said he produced

it in evidence, bearing the appearance upon its face of having been altered in a material particular to his interest and to the prejudice of the other side, it was incumbent upon him to establish by satisfactory evidence that the alteration was made by the grantor or by his authority: *Galland v. Jackman*, 26 Cal. 85, 85 Am. Dec. 172.

Where the body of a note was in print, the place of payment and the word "monthly" was erased by a line in red ink, both the words "monthly," "quarterly," having originally stood in the printed form, the court held that in view of the fact that a printed form was used, that left no plausible reason for saying that the note was altered or that it had the appearance of having been altered, after it was executed: *Corcoran v. Doll*, 32 Cal. 88.

An alteration in a petition to the alcalde for a grant of the lot, found in book "A" of the original grants, was held sufficiently explained by the testimony of the person who himself made the grant as alcalde: *Brooks v. Calderwood*, 34 Cal. 564.

The record of the survey of swamp land patented by the state is not rendered inadmissible in evidence because of an interlineation, where the maker and recorder of the survey testified that the interlineation was made before its execution by him: *Burdell v. Taylor*, 89 Cal. 613, 26 Pac. 1094.

It must appear that the alteration claimed to render the instrument inadmissible was made after the execution, otherwise the supreme court will not reverse for admitting it: *Sedgwick v. Sedgwick*, 56 Cal. 213.

A tax deed which appears upon the face thereof to have been altered in a material respect after its execution is not admissible in evidence to show title in the holder thereof: *Miller v. Lucco*, 80 Cal. 257, 22 Pac. 195.

#### **Cancellation may be Explained.**

The fact that the note was mutilated, and marked "canceled," did not affect the plaintiffs' right to sue upon it, since this matter could all be explained and accounted for: *Steinhart v. National Bank*, 94 Cal. 362, 367.

## CHAPTER II.

## MEANS OF PRODUCTION.

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Producing prisoners in criminal cases.  
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- § 1996. Affidavit for production of prisoner.
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### § 1985. Subpoena Defined.

The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

#### *Cross-references:*

Subpoena, how issued, section 1986; how served, sections 1987, 1988; when witness is not compelled to attend, section 1989; person present need not be served, section 1990; disobedience of subpoena, sections 1991, 1992; process to compel attendance of defaulting witness, sections 1993, 1994; witness when subpoenaed must attend, section 2064; subpoena to witness to testify before commissioner, section 2036; order for examination or production of prisoner, sec-

tions 1995, 1996, 1997; witness served with subpoena privileged from arrest, section 2067 et seq.

See Jones on Evidence, sections 797, 801. Attendance of witnesses—Subpoena.

### **Subpoena in Criminal Cases.**

The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by—

1. A magistrate before whom a complaint is laid, for witnesses in the state, either on behalf of the people or of the defendant.

2. The district attorney, for witnesses in the state, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

3. The district attorney, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried.

4. The clerk of the court in which an indictment or information is to be tried: and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the state, as the defendant may require. (Amendment, approved April 9, 1880; Amendments 1880, p. 27. In effect April 9, 1880.) Pen. Code, 1326.

A subpoena authorized by the last section must be substantially in the following form:

“The people of the State of California to A. B:

“You are commanded to appear before C D, a justice of the peace of — township, in — county, (or as the case may be) at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the people of the State of California against E F.

“Given under my hand this — day of —, A. D. eighteen —. G H, justice of the peace” (or “J K, district attorney,” or “By order of the court, L M, clerk,” or as the case may be). If books, papers, or documents are required, a direction to

the following effect must be contained in the subpoena: "And you are required, also, to bring with you the following" (describing intelligibly the books, papers, or documents required): Pen. Code, 1327.

The district attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses, as upon a trial of an indictment: Pen. Code, 768.

The attendance of the witness may be enforced by a subpoena issued by the magistrate before whom the conditional examination is to be taken: Pen. Code, 1342.

At the preliminary examination, the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense: Pen. Code, 864.

#### **Power of Courts to Compel Production of Evidence.**

As a general principle, all courts have power to compel production of best evidence within the reach of their process, and material to the issue to be tried, and the parties to the litigation have a right to the production of such evidence for the enforcement or the defense of their rights, yet it is within the power of the legislature to set such principle aside, in pursuance of a policy which it deems of paramount importance, and they have set aside that principle, in pursuance of the paramount object to preserve the best evidence of the actual vote cast at an election, and to protect it until it can be examined in a tribunal authorized to try contested election cases: *Ex parte Brown*, 97 Cal. 83, 31 Pac. 840.

#### **Power of Legislature to Subpoena.**

By the common parliamentary law, a legislative assembly may compel the attendance of all persons within the limits of their constituency, as witnesses, in regard to subjects on which they have power to act, and into which they institute an investigation: *Ex parte McCarthy*, 29 Cal. 395.



**Subpoena Duces Tecum—Books must be Material.**

No court or judge has power to punish as a contempt the violation or disregard of an unlawful order; and, where the court has made an unlawful order requiring the secretary of a corporation defendant to produce all of its books, in the absence of any showing that they contain evidence material to the plaintiff's cause, and where the secretary as a witness for the plaintiff has testified to the contrary, an order imprisoning him for contempt for violation of such unlawful order is void, and he is entitled to be released upon habeas corpus: *Ex parte Clark*, 126 Cal. 235, 239.

**§ 1986. Subpoena, How Issued.**

The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending;

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice, or any other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony,

it may be issued by any judge or justice of the peace in places within their respective jurisdiction; with like power to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

*Cross-references:*

Public seal defined, section 1931.

Subdivision 2. Subpoena to compel attendance before commissioner, section 2036; subpoena to compel witness to attend before judge or justice to give deposition to be used in sister state, section 2037, subdivision 3; presumptions in favor of regularity, section 1963, subdivision 15.

Subdivision 3. Punishment for contempt, sections 1991, 1992.

See Jones on Evidence, chapter XXI, sections 797-806. Attendance and examination of witnesses, chapter XXI.

Attendance of witnesses—Subpoena, section 797.

Fees of witnesses, section 798.

Mode of compelling attendance, section 799.

Refusal to testify, section 800.

Production of books and papers—Subpoena duces tecum, section 801.

Who may be compelled to produce documents, section 802.

Practice where a witness is confined—Writ of habeas corpus ad testificandum, section 803.

Recognizance by witnesses, section 804.

Privileged from arrest and service of process, section 805.

Same—Extent and nature of the privileges, section 806.

**Quashing Subpoena.**

In a proceeding to take depositions on affidavit and notice, the subpoenas to the witnesses cannot be quashed by the court, although the affidavit may be insufficient: *Pfister v. Superior Court*, 64 Cal. 400, 1 Pac. 492.

**Notary's Subpoena must be Obeyed.**

The superior court in which an action is pending has power under sections 1986 and 1991 of the Code of Civil Procedure to punish a person for contempt because he has refused to obey a subpoena issued by a notary public, before whom his deposition was to have been taken: *Burns v. Superior Court*, S. F. No. 3538 (Aug. 14th, 1903). Overruling—*Lezinsky v. Superior Court*, 72 Cal. 510, 511.

**Receiver of Land Office not a Judicial Officer.**

A writ of mandate will not lie to compel a judge of the superior court to issue a subpoena to certain persons, commanding them to appear and testify before the register and receiver of a United States land office, in a proceeding before such officers, involving the right to purchase certain public lands of the United States: *Boom v. De Haven*, 72 Cal. 280, 282.

**§ 1987. Service of Subpoena.**

The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

*Cross-references:*

Service where witness concealed, section 1988; witness served with subpoena is privileged from arrest, section 2067.

See Jones on Evidence, section 797—Attendance of witnesses—Subpoena.

**Service of Subpoena in Criminal Cases.**

A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally, and informing him of its contents: Pen. Code, 1328.

**§ 1988. Where Witness Concealed.**

If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing a subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

*Cross-references:*

Service of subpoena in general, section 1987.

**§ 1989. When Witness Must Attend Outside of the County.**

A witness is not obliged to attend as a wit-

ness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

*Cross-references:*

Subpoena in general, section 1985, and cross-references thereunder.

**Thirty-mile Limit.**

Personal attendance more than thirty miles from residence, and out of the county cannot be enforced: *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 599.

A witness more than thirty miles from the place of trial, and outside of the county, but within the state, is not out of the jurisdiction of the court, so as to authorize the reading of his testimony given at a former trial of the cause, for her deposition may be taken: *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 598, 599.

**Attendance of Witness Outside of County in Criminal Cases.**

No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides, or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the supreme court, or a judge of a superior court, upon an affidavit of the district attorney or prosecutor, or of the defendant, or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness. (Amendment, approved April 12, 1880; Amendments 1880, p. 34. In effect April 12, 1880.) Pen. Code, 1330.

When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, and it appears that he has come from a place outside of the

county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the attendance of the witness be upon a trial by an order upon its minutes, or in any other case, the judge, at his discretion, by a written order, may direct the county auditor to draw his warrant upon the county treasurer in favor of witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness.' (Amendment, approved March 8, 1876; Amendments 1875-76, p. 117. In effect in sixty days.) Pen. Code, 1329.

### § 1990. Persons Present in Court.

A person present in court, or before a judicial officer, may be required to testify in the same manner, as if he were in attendance upon a subpoena issued by such court or officer.

#### *Cross-references:*

Refusal to be sworn, how punished, section 1991; warrant of commitment, section 1994.

### § 1991. Disobedience a Contempt.

Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out.

#### *Cross-references:*

Witness disobeying subpoena forfeits one hundred dollars and damages, section 1992; witness need not attend if more than thirty miles and out of county, section 1989; a witness going to place of attendance

with service of subpoena cannot be arrested in a civil action, section 2067; arrest of such witness is void, section 2068; liability of arresting officer, section 2069; witness may be discharged from arrest, section 2070.

See Jones on Evidence, sections 799, 800, 801.

Mode of compelling attendance, section 799.

Refusal to testify, section 800.

Production of books and papers—Subpoena duces tecum, section 801.

### **Striking Out Complaint.**

If the defendant in an action gives the plaintiff notice that he will take his deposition, and procures and serves a subpoena for him to appear and give his deposition, and the plaintiff, without good reason, fails to obey the subpoena, the court may, on motion of the defendant, dismiss the action: *Keisker v. Ayres*, 46 Cal. 82.

The defendant had the undoubted right to have the complaint of plaintiff stricken out, under section 1991 of the Code of Civil Procedure. In this case, a party to an action willfully refused to obey a subpoena, or to be sworn as a witness. In either case, defendant was entitled to have the complaint of such party stricken out: *Pool v. Clifford*, 78 Cal. 371, 373.

### **Striking Out Answer.**

An order of the trial court that the answer of the defendant be stricken from the files because the defendant has disobeyed a subpoena duces tecum is not a judgment for contempt, but, if erroneous, constitutes an error of law, occurring during the trial of the action which, if excepted to, may be corrected on appeal from the judgment and order denying a new trial: *Frazer v. Lynch*, 88 Cal. 621, 26 Pac. 344.

The provision of section 1991 of the Code of Civil Procedure, that in case of disobedience of a subpoena, "if the witness be a party, his complaint or answer may be stricken out," is intended for the protection of the adverse party, whose substantial rights are or may be affected by such disobedience, as well as a punishment for the contempt itself: *Frazer v. Lynch*, 88 Cal. 621, 26 Pac. 344.

The power conferred upon the court to strike out an answer should be exercised with guarded discretion with a view to promote substantial justice; and it is error for the court to strike defendant's answer from the files because of disobedience of a subpoena duces tecum, where the disobedience is by an illiterate person, without the advice of counsel, and where defendant's counsel, before the making of the order, offer to admit everything that could be shown by the papers sought to be produced: *Frazer v. Lynch*, 88 Cal. 621, 26 Pac. 344.

To justify striking out the complaint or answer of a party for disobedience to a notary subpoena, under section 1991 of the Code of Civil Procedure, the disobedience must be proved to have been willful or intentional, so as to constitute a contempt of the authority of the notary, and must be proved by the same degree of evidence as would be required to prove the party guilty of such contempt: *Clifford v. Allman*, 84 Cal. 51, 24 Pac. 292.

There is no sufficient evidence tending to prove willful disobedience to a notary's subpoena by a party summoned as a witness if it appears that the taking of the deposition was postponed several times by consent of counsel, and that the witness was not notified to attend on the day finally appointed, and it does not appear that the witness had personal notice of the appointments made by agreement of counsel: *Clifford v. Allman*, 84 Cal. 528, 24 Pac. 292. See, also, *Clarke v. Reese*, 35 Cal. 89.

#### **Denial of Right for Disobeying Order of Court.**

A defendant in an action for a divorce cannot be denied the process provided by law for procuring the testimony of witnesses residing beyond the jurisdiction of the state, on the ground that he has not obeyed the order of the court requiring him to pay the plaintiff her costs and counsel fees: *Johnson v. Superior Court*, 63 Cal. 578.

#### **Provision as to Striking Out Unconstitutional.**

The constitutional guaranty that no person shall be deprived of his property or personal rights with-



out "due process of law" forbids that, even in a court possessing plenary power to punish for contempt, the power should exist, after having summoned a defendant to answer and obtaining jurisdiction over him, to refuse to allow him to answer or to strike his answer from the files, and condemn him without a hearing, on the theory that he has been guilty of contempt of court; and section 1991 of the Code of Civil Procedure, authorizing such action because of a defendant's refusal to subscribe his deposition, is unconstitutional and void, as well as inapplicable to an action for divorce: *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122.

#### **Authority to Compel Attendance and Obedience.**

Every judicial officer shall have power:

1. To compel obedience to his lawful orders as provided in this code;
2. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code: Code Civ. Proc., 177.

Every court shall have power:

1. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;
2. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code: Code Civ. Proc., 128.

#### **Disobedience is a Misdemeanor.**

Every person guilty of any contempt of court of either of the following kinds, is guilty of a misdemeanor:

Willful disobedience of any process or order lawfully issued by any court.

The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question: Penal Code, 166.

Every person duly summoned as a witness for the prosecution, on any proceedings had under this chap-

ter, who neglects or refuses to attend, as required, is guilty of a misdemeanor: See Code Civ. Proc., part IV, title III, c. 11; Pen. Code, 333.

#### **Failure to Obey Notary's Subpoena.**

The superior court in which an action is pending has no power under sections 1986 and 1991 of the Code of Civil Procedure to punish a person for contempt because he has refused to obey a subpoena issued by a notary public, before whom his deposition was to have been taken: *Lezinsky v. Superior Court*, 72 Cal. 510, 14 Pac. 104. Overruled by *Burns v. Superior Court*, S. F. No. 3538. (Aug. 14, 1903.)

To justify striking out the complaint or answer of a party for disobedience to a notary subpoena, under section 1991 of the Code of Civil Procedure, the disobedience must be proved to have been willful or intentional, so as to constitute a contempt of the authority of the notary, and must be proved by the same degree of evidence as would be required to prove the party guilty of such contempt: *Clifford v. Allman*, 84 Cal. 528, 24 Pac. 292.

#### **Disobedience is a Contempt.**

The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

Disobedience of any lawful judgment, order or process of court.

Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness: Code Civ. Proc., 1209.

Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the court or magistrate as a contempt. A witness disobeying a subpoena issued on the part of the defendant, unless he show good cause for his nonattendance, is liable to the defendant in the sum of one hundred dollars, which may be recovered in a civil action: Pen. Code, 1331.

An employee of a telegraph company, having charge of messages transmitted by it, is not guilty of con-

tempt for refusing to obey a subpoena duces tecum commanding him to search for and produce all messages from and to a large number of persons therein named between specific dates. The subpoena must identify the particular messages required: *Ex parte Jaynes*, 70 Cal. 638, 12 Pac. 117.

A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, in like manner as upon a subpoena issued by a justice of the peace: Pen. Code, 1513.

The petitioner was called as a witness on the trial of a criminal prosecution and refused to be sworn. For this he was adjudged guilty of contempt of court, and punished by imprisonment for one day. Upon the expiration of such imprisonment he was again called as a witness in the same case, and again refused to be sworn. The court thereupon adjudged him guilty of contempt and sentenced him to pay a fine, or, in default thereof, to be imprisoned. Held, that each refusal to be sworn was a separate contempt, for which the court had jurisdiction to impose separate punishments: *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459.

#### **Question Must be Pertinent.**

The refusal of a witness to answer a question not pertinent to the issues on trial is not a contempt, and an order adjudging him guilty of a contempt which fails to show the pertinency of the question is invalid: *Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. 259.

#### **Witness Must Obey.**

If a subpoena issued by a notary for a witness to appear before him and give his deposition fails to specify the precise locality where the notary will take the deposition, the witness will not be excused for nonattendance if he is not misled thereby: *Keisker v. Ayers*, 46 Cal. 82.

The refusal of a person called as a witness to comply with an order of the court directing him to be sworn in a case on trial is a contempt of court, and is not excused by the assertion of the witness as a reason for his refusal that his testimony would have a tendency to subject him to punishment for a felony.

His privilege cannot be urged by the witness until a question is put to him after being sworn, the answer to which would have that tendency. Whether the answer would or might be of such a tendency is to be determined by the court, and it cannot be called upon to do so in advance of the question being put: *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459.

### § 1992. Civil Liability to Aggrieved Party.

A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

#### Civil Action.

A complaint in an action based on section 1992 of the Code of Civil Procedure, to recover the statutory penalty and damages for alleged disobedience to a subpoena duces tecum issued by a notary to take evidence in a case pending in the justice's court, which does not state any facts showing the nature of the pending case, nor the relevancy of the instruments described in the subpoena, nor the materiality of the testimony of the witness to any issue in the case, does not show that the plaintiff is a "party aggrieved," or that he has "sustained damages," within the meaning of the code, and does not state a cause of action: *Nolan v. Grider*, 135 Cal. 49, 67 Pac. 9.

#### Same Rule in Criminal Cases.

A witness disobeying a subpoena issued on the part of the defendant, unless he show good cause for his nonattendance, is liable to the defendant in the sum of one hundred dollars, which may be recovered in a civil action: *Pen. Code*, sec. 1331.

**§ 1993. Warrant for Defaulting Witness.**

In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

**Issuing Bench-warrant.**

On the trial, certain witnesses for the defendant, who had been served with subpoenas out of the county in which the action was tried, did not appear when called to testify. The defendant thereupon asked for a bench-warrant to enforce their appearance. The court denied the application. It did not appear by affidavit or other sworn statement what was sought to be proved by the witnesses, or that their testimony would have been material to the defendant, or that they were within immediate reach of the process of the court. Held, that the action of the court was proper: *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503.

**§ 1994. Form of Warrant.**

Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in

the same manner as process issued by the superior court. [Amendment approved April 16, 1880; Amendments 1880, p. 114. In effect April 16, 1880.]

*Cross-references:*

Disobedience to subpoena, how punished, section 1991.

**§ 1995. Prisoners, Production of.**

If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court;

2. By a justice of the supreme court, or a judge of the superior court of the county where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court. [Amendment approved April 16, 1880; Amendments 1880, p. 115. In effect April 16, 1880.]

*Cross-references:*

Affidavit required to procure order for removal of prisoner, section 1996.

**Producing Prisoners in Criminal Cases.**

When a material witness for a defendant, under a criminal charge, is a prisoner in the state prison, or

in the county jail of a county other than that in which the defendant is to be tried, his deposition may be taken, on behalf of the defendant, in the manner provided for in the case of a witness who is sick, and the provisions of the Penal Code, commencing with section 1335, and ending with section 1345, shall, so far as applicable, govern in the application for and in the taking and use of such deposition. Such deposition may be taken before any magistrate or notary public of the county in which the jail or prison is situated; or in case the witness is confined in the state prison, and the defendant is unable to pay for taking the deposition, before the warden or clerk of the board of directors of the state prison, whose duty it shall be to act without compensation. Every officer, before whom testimony shall be taken by virtue hereof, shall have authority to administer, and shall administer, an oath to the witness that his testimony shall be the truth, the whole truth, and nothing but the truth. (Amendment, approved April 9, 1880; Amendments, 1880, p. 27. In effect April 9, 1880.) Pen. Code, 1346.

### **Compelling Attendance of Prisoners.**

Although under section 1567 of the Penal Code a defendant in a criminal case is allowed the right to have the process of the court to compel the attendance of a convicted prisoner as a witness in his behalf, whether such prisoner is in the state prison or the county jail, yet the power conferred by that section should be exercised under the same circumstances and with the same restrictions under which the common-law courts were accustomed to issue the writ of habeas corpus ad testificandum: *People v. Willard*, 92 Cal. 482, 28 Pac. 585.

The order for process to compel the attendance of a convicted prisoner as a witness should not be made except upon a very strict showing of the materiality of the testimony, and the necessity of securing the attendance of the prisoner as a witness, and upon previous notice to the state of the application; but when such notice has been given, and a case of the materiality of the evidence and apparent necessity is

made out, and the good faith of the applicant also appears, the court ought in the exercise of its discretion, to make the order for the attendance of the prisoner as a witness: *People v. Willard*, 92 Cal. 482, 28 Pac. 585.

The court may order the attendance of witnesses who are confined in the state's prison when it appears to the satisfaction of the court that such attendance does not issue as matter of right; and the court may, in its discretion, refuse to require the attendance of particular witnesses so confined, and may allow their depositions to be taken: *People v. Putnam*, 129 Cal. 258, 61 Pac. 961.

When the testimony of a material witness for the people is required in a criminal action, before a court of record in this state, and such witness is a prisoner in the state prison, or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by the judge thereof; but in case the prison or jail is out of the county in which the application is made, such order shall only be made upon the affidavit of the district attorney, or other person, on behalf of the people, showing that the testimony is material and necessary; and even then the granting of the order shall be in the discretion of the court or judge. The order shall be executed by the sheriff of the county in which it shall be made, whose duty it shall be to bring the prisoner before the proper court, to safely keep him, and when he is no longer required as a witness, to return him to the prison or jail whence he was taken; the expense of executing such order shall be paid by the county in which the order shall be made: *Pen. Code*, 1333.

### § 1996. Affidavit for Production of Prisoner.

Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.



*Cross-references:*

Order for examination of temporary removal of prisoner, section 1995; deposition must be taken unless witness imprisoned in the same county, section 1997.

**§ 1997. When Prisoner May be Produced.**

If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

## CHAPTER III.

### MANNER OF PRODUCTION.

- Article I. Mode of Taking the Testimony of Witnesses.  
II. Affidavits.  
III. Depositions.  
IV. Manner of Taking Depositions Out of the State.  
V. Manner of Taking Depositions in the State.  
VI. General Rules of Examination.

### ARTICLE I.

#### MODE OF TAKING THE TESTIMONY OF WITNESSES.

- § 2002. Methods of taking testimony.  
Affidavit—Equal to oral testimony in support of motion.  
§ 2003. Affidavit defined.  
§ 2004. Deposition defined.  
Grand jury—Report of testimony before, not a deposition.  
Notary—Deposition need not be written personally by him.  
§ 2005. Oral examination defined.  
§ 2006. Depositions must be by question and answer.

**§ 2002. Methods of Taking Testimony.**

The testimony of witnesses is taken in three modes:

1. By affidavit;
2. By deposition;
3. By oral examination.

*Cross-references:*

Subdivision 1. Affidavit defined, section 2003; affidavit on taking deposition, section 2031; affidavit of concealment of witness, section 1988; affidavit on taking deposition after commission, section 2036; affidavit on taking deposition of witness to be used in sister state, section 2037; affidavit of witness under arrest, section 2069; affidavits generally, sections 2009-2015; person making affidavit is termed witness, section 1878.

Subdivision 2. Depositions when used, section 2009; deposition of witness out of the state, sections 2020, 2024-2028, inclusive; manner of taking deposition in this state, sections 2021, 2031-2038, inclusive; deposition on proceedings to perpetuate testimony, section 2086.

Subdivision 3. Oral examination defined, section 2005; rules of oral examination, sections 2042-2054, inclusive; all parties may examine witness, section 1846; definition of witness, section 1878.

**Affidavit—Equal to Oral Testimony in Support of Motion.**

The exclusion of oral testimony of witnesses subpoenaed by the defendant in support of the charge of misconduct is not prejudicial, where the affidavits of each of the witnesses was presented, if there is no showing that any one of them had refused to testify fully by affidavit to all the material facts within his knowledge. The law allows no difference be-  
ment: *People v. Northey*, 77 Cal. 618, 629.

offered in support of motions: *People v. Sullivan*, 129 Cal. 557, 563.

**§ 2003. Affidavit Defined.**

An affidavit is a written declaration under oath, made without notice to the adverse party.

*Cross-references:*

Affidavit defined, section 2003; affidavit on taking deposition, section 2031; affidavit of concealment of witness, section 1988; affidavit on taking deposition after commission, section 2036; affidavit on taking deposition of witness to be used in sister state, section 2037; affidavit of witness under arrest, section 2069; affidavits generally, sections 2009-2015; person making affidavit is termed witness, section 1878.

**§ 2004. Deposition Defined.**

A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

*Cross-references:*

Depositions when used, section 2009; deposition of witness out of the state, sections 2020, and 2024-2028, inclusive; manner of taking deposition in this state, sections 2021, 2031-2038, inclusive; depositions on proceedings to perpetuate testimony, section 2086.

**Grand Jury—Report of Testimony Before, Not a Deposition.**

If the defendant has testified before the grand jury, it is not necessary to indorse his name upon the indictment as a witness; and the failure to do so is not ground of motion to set aside the indictment: *People v. Northey*, 77 Cal. 618, 629.

The notes of a shorthand reporter of testimony given orally upon a trial and read to the grand jury

by the reporter are not a deposition, within the meaning of the statute requiring the name of a witness, whose deposition was given to the grand jury, to be inserted at the foot of the indictment or indorsed thereon: *People v. Northey*, 77 Cal. 618, 629.

**Notary—Deposition Need Not be Written Personally by Him.**

The notary taking a deposition may either appoint a clerk or a shorthand reporter to take down the testimony; and the fact that such reporter was not appointed by the court, and that his transcript of the testimony into longhand was objected to by defendant's counsel, is immaterial, if the certificate of the notary states that the transcription into longhand was by the notary carefully read to the witness, and, being by him first corrected, was subscribed by the witness in the presence of the notary: *Kyle v. Craig*, 125 Cal. 107, 108.

**§ 2005. Oral Examination Defined.**

An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

*Cross-references:*

Oral examination defined, section 2005; rules of oral examination, sections 2042-2054, inclusive; all parties may examine witness, section 1846; definition of witness, section 1878.

**§ 2006. Depositions Must be by Question and Answer.**

Depositions must be taken in the form of question and answer, and the words of the witness must be written down, unless the parties agree to a different mode.

*Cross-references:*

Form of interrogatory, section 2025; deposition may be excluded unless fairly taken, section 2033; deposition on proceedings to perpetuate testimony must be question and answer, section 2086.

## ARTICLE II.

## AFFIDAVITS.

- § 2009. Affidavits, when used.
  - Affidavit need not be signed.
  - Affidavit in general.
  - Motions.
- § 2010. Affidavit of publication.
  - Tax deed, itself evidence of publication.
  - Affidavit of publication.
- § 2011. Affidavits of publication—When filed.
  - May be contradicted.
  - Probate—Defective affidavit.
- § 2012. Affidavit—Before whom taken.
  - United States court commissioner not entitled to take affidavit.
  - Who may take affidavits in this state.
- § 2013. Affidavits taken in other states.
- § 2014. Affidavits taken in foreign countries.
- § 2015. Certificate to affidavits taken without the state.

## § 2009. Affidavits, When Used.

An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and

in any other case expressly permitted by some other provision of this code.

*Cross-references:*

Affidavit defined, section 2003; methods of taking testimony, section 2002; affidavit on taking deposition, section 2031; affidavit on concealment of witness, section 1988; affidavit on taking deposition on commission, section 2036; affidavit in taking deposition of witness to be used in sister state, section 2037; affidavit of witness under arrest, section 2069; affidavit of publication, section 2010; affidavit of publication must be filed, section 2011; before whom affidavit may be taken in this state, section 2012; in another state, section 2013; in foreign country, section 2014; certificate of genuineness of signature on foreign affidavit, section 2015; in all cases not specified in section 2009 deposition must be taken, section 2019.

**Affidavit Need not be Signed.**

An affidavit need not be signed by the party making it: *Ede v. Johnson*, 15 Cal. 53.

**Affidavit in General.**

It is not necessary for a deputy clerk, before whom affidavits are sworn to, to sign his principal's name to the jurat: *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95.

Where the affidavit of a juror is sworn to be correct by another party it may be treated as the latter's original affidavit: *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78.

It is no objection to affidavit that notary before whom it is taken is attorney in the action in which the affidavit is to be used: *Reavis v. Cowell*, 56 Cal. 588.

It is not error for the court to exclude affidavits filed on a motion for a new trial, which are written in a foreign language: *Spencer v. Doane*, 23 Cal. 419.

It is within the discretion of the court, after hearing the affidavits, to require the oral examination of

the parties, if they are present at the trial, in relation to the facts and circumstances detailed by them: *Bagley v. Eaton*, 10 Cal. 126.

That which follows a videlicet does not destroy that which precedes it; and, as a general rule, if it is repugnant to the preceding matter, it will be rejected: *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523.

An affidavit was entitled in the court and cause, and contained the usual jurat and a seal of a notary, but it did not state a venue. Held, that the objection of a want of venue cannot be sustained in view of the facts and legal presumption in this case, even if it be true that the want of a venue is in general fatal to an affidavit: *Reavis v. Cowell*, 56 Cal. 588.

### **Motions.**

Notwithstanding the pendency of an appeal from a judgment foreclosing a mortgage of real property, the judgment-roll is admissible in evidence on an application for a writ of assistance to recover possession of the land sold at the foreclosure sale, if no undertaking staying the execution of the judgment has been given as provided in section 945 of the Code of Civil Procedure.

On an application for the writ of assistance as against the parties to the action, the facts of the presentation of the sheriff's deed to them, the demand of possession of the land, and their refusal to surrender it may be shown by affidavit: *California etc. Bank v. Graves*, 129 Cal. 649, 651.

### **§ 2010. Affidavit of Publication.**

Evidence of the publication of a document or notice required by law, or by an order of a court or judge to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, speci-



fying the times when and the paper in which the publication was made.

*Cross-references:*

Affidavit defined, section 2003; for what purpose affidavits may be used, section 2009; with whom affidavit of publication to be filed, section 2011; before whom affidavit may be made, sections 2012-2014; certificate of affidavit taken in another state or foreign country, section 2015.

**Tax Deed, Itself Evidence of Publication.**

A tax deed is conclusive evidence that proper proof was made of publication by filing with the clerk and recorder of the county the affidavit required by section 3769 of the Political Code: *Haaren v. High*, 97 Cal. 445, 447.

**Affidavit of Publication.**

The affidavit of publication is only prima facie evidence of the facts therein stated, and may be contradicted by the files of the newspaper in which the notice was published, showing that the notice was not published for the statutory time: *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064.

A direct statement in the affidavit of publication that summons was published each week for two months between two named dates is not overcome and rendered valueless by a subsequent statement under videlicet in which one regular day for the issuance of the paper is omitted from the enumeration: *Howard v. McChesney*, 103 Cal. 536, 37 Pac. 523.

If the court is not requested to limit such evidence to the purpose for which by this section it is admissible, the printed copy may be received as evidence of the contents of the document: *County of San Luis Obispo v. White*, 91 Cal. 432, 437, 24 Pac. 864, 27 Pac. 756 (election proclamation).

**§ 2011. Affidavits of Publication—When Filed.**

If such affidavit be made in an action or spe-

cial proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case, the original affidavit, or a copy thereof, certified by the judge of the court or clerk having it in custody, is *prima facie* evidence of the facts stated therein. [Amendment approved March 24, 1874; Amendments 1873-74, p. 388. In effect July 1, 1874.]

*Cross-references:*

Affidavit of publication by whom made, section 2010; *prima facie* evidence defined, section 1833.

**May be Contradicted.**

The affidavit of publication is only *prima facie* evidence of the facts therein stated, and may be contradicted by the files of the newspaper in which the notice was published, showing that the notice was not published for the statutory time: *Wise v. Williams*, 88 Cal. 30, 34.

**Probate—Defective Affidavit.**

The jurisdiction of the court over the probate proceeding is to be determined from the record thereof; and where the decree contains all the necessary recitals to show that the court had jurisdiction over the matter of the petition for probate, which was shown to have been filed, it is immaterial whether the affidavit of publication of the notice of hearing was regular or defective. The court having jurisdiction had power to hear the evidence as to the will, and to permit a new affidavit of publication to be filed thereafter, if necessary: *People v. Rodley*, 131 Cal. 240, 252.

**§ 2012. Affidavit Before Whom Taken.**

An affidavit to be used before any court, judge, or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this state.

***Cross-references:***

Affidavit when taken out of this state, section 2013; when taken in foreign country, section 2014; affidavit defined, section 2003; affidavit may be used for what purposes, section 2009, and see cross-references under section 2009.

**United States Court Commissioner not Entitled to Take Affidavit.**

A United States court commissioner is not an officer authorized to administer oaths within the meaning and intent of section 1494 of the Code of Civil Procedure. Held, accordingly, that an action could not be maintained against an executor upon a rejected claim against the estate, where it appeared that the affidavit to the claim had been made before such an officer: *Winder v. Hendricks*, 56 Cal. 464, 465.

**Who May Take Affidavits in This State.**

Each of the justices of the supreme court, and judges of the superior courts, shall have power in any part of the state, and every justice of the peace within his city and county, city, or town, to take and certify an affidavit or deposition to be used in this state: Code Civ. Proc., 179.

Section 2012 is not to be deemed exclusive of the power conferred by the Political Code upon the district attorney but the provisions of the two codes are to be deemed cumulative: *Haile v. Smith*, 128 Cal. 415, 60 Pac. 1032.

**§ 2013. Affidavits Taken in Other States.**

An affidavit taken in another state of the

United States, to be used in this state, may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any notary public in another state, or before any judge or clerk of a court of record having a seal. [Amendment approved March 24, 1874; Amendments 1873-74, p. 389. In effect July 1, 1874.]

*Cross-references:*

Affidavit defined, section 2003; for what affidavits may be used, section 2009, and see cross-references under section 2009; before whom affidavit may be taken in this state, section 2012; in foreign country, section 2014; commissioner to take deposition may administer oath, section 2026; trial not to be postponed by reason of nonreturn of commission, section 2027; depositions to be used for state, section 2024; sister state includes territories and United States, section 1924; public seal defined, section 1931; courts take judicial notice of what seals, section 1875; certificate where affidavit taken in another state or foreign country, section 2015.

**§ 2014. Affidavits Taken in Foreign Countries.**

An affidavit taken in a foreign country to be used in this state, may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country. [Amendment approved March 24, 1874; Amendments 1873-74, p. 389. In effect July 1, 1874.]

*Cross-references:*

Affidavit defined, section 2003; for what purpose affidavit may be used, section 2009; by whom taken to be used in this state, section 2012; before whom taken in sister state, section 2013; certificate where affidavit taken in another state or foreign country, section 2015.

**§ 2015. Certificate to Affidavits Taken Without the State.**

When an affidavit is taken before a judge of a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

*Cross-references:*

Of what courts take judicial notice, section 1875; seal defined, section 1931; judicial record of foreign country how proven; sections 1906, 1907; judicial record of sister state how proven, section 1905; sister state includes United States and territories, section 1924.

### ARTICLE III.

#### DEPOSITIONS.

- § 2019. Depositions, when compulsory.  
Statute must be strictly followed.
- § 2020. Testimony of witness out of state, when taken.  
Testimony by commission in criminal cases.
- § 2021. Depositions, in what cases taken.  
Deposition of party.  
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Conditional depositions in criminal cases.  
Condition, used if still absent in but one case.  
Deposition of absent witness.  
Depositions on information before magistrate.  
Depositions in homicide cases.  
Reporter's notes.  
Requisite showing.  
Depositions on preliminary examination.  
Depositions on preliminary examination—  
Authentication.

#### § 2019. Depositions, When Compulsory.

In all cases other than those mentioned in section 2009, where a written declaration under oath is used, it must be a deposition as prescribed by this code.

#### *Cross-references:*

Affidavit may be used to verify pleading or paper in a special proceeding, prove service of summons, no-

tice of other papers in an action of special proceeding; to obtain a provisional remedy, examination of a witness or stay of proceeding or upon a motion, section 2009; affidavit of publication of summons, sections 2010, 2011; deposition defined, section 2004; deposition of witness to be used out of the state, section 2020, 2024-2028, inclusive; manner of taking deposition in this state, sections 2021, 2031-2038, inclusive; depositions on proceedings to perpetuate testimony, section 2006; who may use deposition of witness taken out of the state, section 2028; who may use deposition of witness taken in the state, section 2032.

### **Statute Must be Strictly Followed.**

All requisitions of statute in relation to taking must be strictly complied with; and this must appear upon the deposition to entitle it to admission: *Dye v. Bailey*, 2 Cal. 383.

Taking testimony by depositions is in derogation of the common law, and must not only be done before the proper officer, but every requirement of law must be complied with: *McCann v. Beach*, 2 Cal. 25.

Taking of depositions is in derogation of common law, and the officers must follow the statute strictly: *Dye v. Bailey*, 2 Cal. 383. Cited 2 Idaho, 261, 13 Pac. 85.

Any real departure from course prescribed by sections 882 and 869 of the Penal Code for taking the deposition of a witness in a criminal case, who is unable to procure sureties for his appearance at the trial, renders the deposition objectionable. Where the fact that the witness was unable to procure sureties for his appearance at the trial was not shown by the oath of anyone, and the deposition itself does not show that it was read over to the witness, and that he signed it after acknowledging it to be correct, and was not certified by the officer before whom it was taken, it is inadmissible against the defendant: *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862. Cited 82 Cal. 466, 22 Pac. 1120.

not be used if his presence can be procured at the time of the trial of the cause. [Amendment approved March 9, 1878; Amendments 1877-78, p. 112. In effect sixty days after passage.]

*Cross-references:*

Deposition defined, section 2004; witness defined, section 1878; when deposition of witness out of the state may be taken, section 2020; proceeding to perpetuate testimony, sections 2083, 2089; testimony of deceased witness, section 1870, subdivision 8.

Subdivision 1. Party may be a witness, section 1879; beneficiary may be a witness, section 1879.

Subdivision 2. Subpoena does not run outside of the county and more than thirty miles, section 1989; proof necessary to use deposition under this subdivision, section 2032.

Subdivision 3. Proof of continuance of absence, section 2032; proof of absence where deposition taken under perpetuation proceedings, section 2088.

Subdivision 4. Proof of continuance of in privity, section 2032; proof of death or insanity where deposition taken under perpetuation proceedings, section 2088.

Subdivision 5. Affidavit may be used on motions, section 2009; when deposition must be used, section 2019.

Subdivision 6. One witness sufficient to prove a fact, section 1844.

See Jones on Evidence, sections 655-698, 722, 792. Statutory discovery, section 722.

Waiver under the statutes, section 792.

Whose deposition may be taken under federal statute, section 655.

Before whom depositions may be taken—The notice, section 656.

The notice—Time of giving, section 657.

Same—Names of witnesses—Of the court and officers, section 658.

Service of the notice, section 659.

Mode of taking, section 660.



- The certificate, sections 661, 662.  
Waiver of objections, section 663.  
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Depositions *dedimus potestatem*, section 665.  
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Notice of taking—Time, section 678.  
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Same—Place of taking, section 681.  
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Persons to take depositions, section 684.  
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Irregularities—As to names, etc., section 687.  
Same—Other irregularities, section 688.  
Waiver of objection, section 689.  
Same—Objections to the authority of the commissioner, section 690.  
When objections are to be made, section 691.  
Mere general objections, section 692.  
Renewal of objections—Waiver, section 693.  
Objections to the substance—When made, section 694.  
Statutory provisions as to objections, section 695.  
Depositions not admissible unless cause therefor continues, section 696.  
Same—Modifications of the rule—Statutes, section 697.  
Continuance of the case—How inferred, section 698.

**Deposition of Party.**

Where the deposition of the plaintiff is taken before the trial, under subdivision 1 of section 2021 of the Code of Civil Procedure, it cannot be rightfully rejected as evidence for the defendant, on the sole ground that the plaintiff was present in court and examined as a witness, and cross-examined by the defendant at the trial; and the provision to that effect, found in section 2032 of that code does not apply to subdivision 1 of section 2021: *Adams v. Weaver*, 117 Cal. 42, 48 Pac. 972.

The deposition of a plaintiff taken at the instance of the defendant, under subdivision 1 of section 2021 of the Code of Civil Procedure, may be read in evidence on the trial without first showing the absence of the witness: *Newell v. Desmond*, 74 Cal. 46, 15 Pac. 369.

When a party has been offered as a witness in his own behalf, and fully examined, and is present in court, it is entirely in the discretion of the court to refuse to allow his counsel to read his deposition taken before the trial. Perhaps it may be different if it was made to appear that there was something concerning which the party could not have been questioned when on the stand: *Grigsby v. Schwartz*, 82 Cal. 278, 22 Pac. 1041.

**Showing Due Diligence.**

Where it is satisfactorily shown to the court that due diligence has been used, and that a witness produced at the preliminary examination of the defendant cannot be found within the state, it does not abuse its discretion in holding that the deposition of the witness may be received in evidence.

The testimony of the officer requested to serve a subpoena for a prosecuting witness, to the effect that, after following every clew of inquiry, he was informed by various persons acquainted with the witness that he had left the state, and that it could not be told when he would return, though it was said by one person that he was liable to return upon business at any time, but that, after further efforts to locate

the witness, the officer could not find him, is a sufficient showing to justify the admission in evidence of the deposition of the witness taken at the preliminary examination: *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779.

The showing that a witness is out of the state is sufficient to admit his deposition if it appears that, in answer to inquiries made at his former place of business, and of others who knew him, it was said they did not know where he was, but understood that he was out of the state: *Renton v. Monnier*, 77 Cal. 449, 19 Pac. 820.

### **Conditional Depositions in Criminal Cases.**

When a defendant has been held to answer a charge for a public offense, he may, either before or after an indictment or information, have witnesses examined conditionally, on his behalf, as prescribed in this chapter and not otherwise. (Amendment, approved April 9, 1880; Amendments 1880, p. 27. In effect April 9, 1880.) Pen. Code, 1335.

When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally: Pen. Code, 1336.

### **Condition, Used if Still Absent in but One Case.**

The only case in which the presence of a witness whose deposition has been taken is required, if it can be procured at the trial, is where the deposition was taken under the sixth subdivision of section 2021 of the Code of Civil Procedure. The presence or absence of a party whose deposition has been taken under subdivision 1 of said section is immaterial, and such deposition may be read on the trial by either party, though the witness be in court when it is read, and though other witnesses are present by whom the same facts can be proved: *Johnston v. McDuffee*, 83 Cal. 30, 32.

**Deposition of Absent Witness.**

The deposition of an absent witness, taken at the preliminary examination, may be used at the trial in a case of homicide, and its admission is not in violation of section 13 of article 1 of the constitution of the state: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

Where a witness is shown to be out of the jurisdiction of the court, the testimony of the witness taken on a former trial is admissible: *Benson v. Shotwell*, 103 Cal. 163, 27 Pac. 147.

**Depositions on Information Before Magistrate.**

When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them: *Pen. Code*, 811.

**Depositions in Homicide Cases.**

The testimony of each witness, in cases of homicide, must be reduced to writing, as a deposition, by the magistrate, or under his direction; and in other cases upon the demand of the prosecuting attorney, or the defendant, or his counsel. The magistrate before whom the examination is had may, in his discretion, order the testimony and proceedings to be taken down in shorthand in all examinations herein mentioned, and for that purpose he may appoint a shorthand reporter. The deposition or testimony of the witness must be authenticated in the following form:

1. It must state the name of the witness, his place of residence, and his business or profession.

2. It must contain the questions put to the witness, and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth; except in cases where the testimony is taken down in shorthand, the answer or answers of the witness need not be read to him.

3. If a question put be objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated.

4. The deposition must be signed by the witness, or if he refuses to sign it, his reason for refusing must be stated in writing as he gives it; except in cases where the deposition is taken down in shorthand, it need not be signed by the witness.

5. It must be signed and certified by the magistrate when reduced to writing by him, or under his direction, and when taken down in shorthand, the transcript of the reporter appointed as aforesaid, when written out in longhand writing and certified as being a correct statement of such testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings. The reporter shall, within ten days after the close of such examination (if the defendant be held to answer to the charge), transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk of the county, or city and county, in which the defendant was examined, and shall in all cases file his original notes with said clerk.

6. The reporter's compensation shall be fixed by the magistrate before whom the examination is had, and shall not exceed that now allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county, or the city and county, in which the examination is had, on the certificate and order of the said magistrate. (Amendment approved March 14, 1885; Stats. 1885, p. 131; repealed conflicting acts. In effect March 14, 1885.) Pen. Code, 869.

### **Reporters' Notes.**

The notes of a shorthand reporter of testimony given orally upon the trial, and read to the grand jury by the reporter, are not a deposition, within the meaning of the statute requiring the name of a witness, whose deposition was given to the grand

jury, to be inserted at the foot of the indictment or indorsed thereon: *People v. Northey*, 77 Cal. 613, 19 Pac. 865, 20 Pac. 129.

On the trial of an indictment, the reporter's notes of the testimony given on the trial of a former indictment for the same offense, by a witness shown to be out of the state, are inadmissible in evidence: *People v. Ah Chue*, 57 Cal. 567.

A transcript of the shorthand reporter's notes in a criminal case, certified as provided in section 869 of the Penal Code, is placed upon the same footing as a deposition and is admissible in like cases: *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

By an act of the legislature, the reporter's notes, taken before a committing magistrate upon a preliminary examination for felony, are made prima facie evidence of the testimony given; but held, that such notes were inadmissible where the testimony was taken through an interpreter: *People v. Lee Fat*, 54 Cal. 527.

Under section 869 of the Penal Code, the reporter's transcript of the notes taken by him at an examination of a prosecuting witness before the committing magistrate must be certified to be a correct statement of the testimony and proceedings, and not merely that it is a full, true and correct transcript of the shorthand notes. The certificate must be correctly written, and its absence cannot be supplied by parol evidence so as to make the transcript admissible; though it would be a proper course to have the reporter refresh his memory, and testify orally as to what occurred at the examination: *People v. Carty*, 77 Cal. 213, 19 Pac. 490.

#### **Requisite Showing.**

Certain depositions were taken on behalf of the plaintiff under subdivision 2 of section 2021 of the Code of Civil Procedure. The attorney for the defendant was present, and cross-examined the witness. Before the depositions were offered, it was shown that when they were taken the witnesses resided in the county of Alameda, and that they con-

tinued to reside there at the time of the trial. The action was brought and the trial had in the city and county of San Francisco. The depositions were admitted against the objection of the defendant to the sufficiency of the showing as to the absence of the witnesses. Held, that no error was committed in overruling the objection: *Sunol v. Molloy*, 63 Cal. 369, 370.

### **Depositions on Preliminary Examination.**

The deposition of an absent witness, taken at the preliminary examination, may be used at the trial in a case of homicide, and its admission is not in violation of section 13 of article 1 of the constitution of the state: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

Error in admitting depositions in evidence, without preliminary proof that the witnesses resided out of the county where the cause was being tried, is waived if the party against whom the depositions were offered, dispensed with the formal proof of such fact on the trial, and accepted the verbal statement of the opposing counsel as to their nonresidence: *Estate of Learned*, 70 Cal. 140, 11 Pac. 587.

The court was justified in finding that the witness A could not, with reasonable and due diligence, be found in the state; his deposition taken before the examining magistrate was therefore admissible: *People v. Gannon*, 61 Cal. 476.

The showing that a witness is out of the state is sufficient to admit his deposition if it appear that, in answer to inquiries made at his former place of business, and of others who knew him, it was said they did not know where he was, but understood that he was out of the state: *Renton v. Monnier*, 77 Cal. 449, 19 Pac. 820.

A deposition taken under section 882 of the Penal Code, pending an information upon a void commitment, which is set aside, is not taken in any pending case, there being no jurisdiction in the superior court to try the defendant, and such deposition cannot be

read in evidence upon the trial of a second information filed after a proper recommitment of the defendant: *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

The deposition of a witness in a criminal case taken by the committing magistrate, under section 869, Penal Code, is not admissible in evidence against the defendant, under section 686, Penal Code, unless taken in manner and form, and certified as required by the former section and the certificate must set forth an actual compliance with all the requirements of the statute. Held, accordingly, that a deposition not certified by the magistrate, otherwise than by a jurat, in the ordinary form, was inadmissible: *People v. Morine*, 54 Cal. 575.

#### **Depositions on Preliminary Examination—Authentication.**

The authentication of the deposition of a witness given on the preliminary examination of the defendant accused of a felony, by a certificate of the stenographer who took the testimony, stating that it is "a true and correct transcript from the shorthand notes taken by me, and a full and complete record of the proceedings had and testimony given in the above-entitled case," though careless in not following the language of the statute, is in substantial compliance therewith and includes in the meaning of the certificate a correct statement of such testimony and proceedings in the case, as required by section 869 of the Penal Code: *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779; *People v. Riley*, 75 Cal. 98, 16 Pac. 544.



## ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF  
THE STATE.

- § 2024. Commission to take deposition.  
Commission defined.  
Refusal to issue commission.  
Contents of commission.  
Depositions of absent witnesses in criminal cases.  
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Settling interrogatories—Criminal procedure.
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- § 2026. Commission—Oath and certificate.  
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Commissions, how returned in criminal cases.  
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Commission in criminal cases may be returned by agent.  
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Commission must be open to inspection.
- § 2027. Postponement of trial for nonreturn of deposition.  
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- § 2028. Either party may use deposition.  
The deposition may be used, how.  
Depositions under commission in criminal cases, how used.

**§ 2024. Commission to Take Deposition.**

The deposition of a witness out of this state may be taken upon a commission issued from the court under the seal of the court, upon an order of the court or a judge or a justice thereof, on the application of either party, upon five days' previous notice to the other. If the court be a justice's court, the commission shall have attached to it a certificate, under seal by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the commission. If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace or commissioner selected by the court or judge or justice issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties. [Amendment approved March 10, 1891; Stats. 1891, p. 51; in effect immediately.]

*Cross-references:*

Deposition defined, section 2004; witness defined, section 1878; manner of taking deposition within state, sections 2031-2038, inclusive; seal defined, section 1931; when deposition of witness out of the state may be taken, section 2020; settlement of interroga-

tories, section 2025; authority of commissioner to take deposition, section 2026; trial postponed for non-return, section 2027; who may use deposition, section 2028; affidavit may be taken before commissioner to take testimony, section 2013.

See Jones on Evidence, sections 685-686, 719.  
Comity between states, section 685.  
Mode of taking and returning depositions, section 686.

Depositions taken in foreign countries, section 719.

### **Commission Defined.**

A commission is a process issued under the seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission: Pen. Code, section 1351.

### **Refusal to Issue Commission.**

Order refusing to issue commission to take testimony is not appealable, though it may be reviewed on appeal from the final judgment in the case: *People v. Stillman*, 7 Cal. 117.

### **Contents of Commission.**

The commission to take a deposition need not state on its face that the person to whom it issued was a judge or justice of the peace: *Dambmann v. White*, 48 Cal. 439.

The presumption is that on granting the commission, the judge who ordered it performed his duty, and directed it to a person who was qualified to execute it: *Dambmann v. White*, 48 Cal. 439.

The real name of the person intended to be examined under the commission must be given to the opposite party and inserted in the commission, in order that the opposite party may intelligently prepare cross-interrogatories: *Smith v. Westerfield*, 88 Cal. 374. 26 Pac. 206.

**Depositions of Absent Witnesses in Criminal Cases.**

The application must be made upon affidavit, stating:

1. The nature of the offense charged.
2. The state of the proceedings in the action, and that an issue of fact has been joined therein.
3. The name of the witness, and that his testimony is material to the defense of the action.
4. That the witness resides out of the state: Pol. Code, 352.

The application may be made to the court, or a judge thereof, and must be upon three days' notice to the district attorney. (Amendment, approved March 12, 1880; Amendments 1880, p. 6. In effect March 12, 1880.) Pol. Code, 353.

If the court to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony; and the court may insert in the order a direction that the trial be stayed for a specified time, reasonably sufficient for the execution and return of the commission: Pol. Code, 1354.

Superior court has jurisdiction and is in duty bound to grant order for commission to take the depositions of witnesses out of the state, to be used in a criminal case, in behalf of the defendant, when the evidence sought to be elicited is material and important to the defense, and the showing made contains all the statute requires. Nor will it be considered whether the ruling refusing such commission was within the discretion of the court if it is refused on the sole ground of want of jurisdiction to make the order: *People v. Lundquist*, 84 Cal. 23, 24 Pac. 153.

**Objections to Foreign Deposition, How Waived.**

Where the parties stipulate that the deposition of a witness out of the state may be taken by a designated person, and when taken may be used on the trial, they are afterward estopped from objecting that the

deposition was not taken under a commission issued by the trial court: *Palmer v. Uncas Min. Co.*, 70 Cal. 614, 11 Pac. 666; *Holm v. Uncas Min. Co.*, 70 Cal. 614, 11 Pac. 666.

If a commission to take the deposition of a witness out of this state is issued, on the application of one party without the consent of the other, to a person who is not a judge or justice of the peace, or a commissioner appointed by the governor of this state, and the party who does not consent, after the appointment, files cross-interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the commissioner was improperly appointed: *Crowther v. Rowlandson*, 27 Cal. 376.

### § 2025. Settling Interrogatories.

Such proper interrogatories, direct and cross, as the respective parties may prepare to be settled if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

#### *Cross-references:*

Commission to take testimony in general, section 2024; deposition must be taken in the form of question and answer, section 2006; deposition must be excluded if not fair, section 2033.

#### **Settling Interrogatories—Criminal Procedure.**

When the commission is ordered, the defendant must serve upon the district attorney, without delay, a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the court or judge. The district

attorney may in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories, either party may insert any questions pertinent to the issue. When the interrogatories and cross-interrogatories are presented to the court or judge, according to the notice given, the court or judge must modify the questions so as to conform them to the rules of evidence, and must indorse upon them his allowance and annex them to the commission: Pen. Code, sec. 1355.

**2025½. Oral Depositions of Nonresident Witnesses.**

When a party shall desire to take the evidence of a nonresident witness, to be used in any cause pending in this state, the party desiring the same (or where notice shall have been given that a commission to take the testimony of a nonresident witness will be applied for, the opposite party, upon giving the other three days' notice in writing of his election so to do), may have a commission directed in the same manner as provided in section 2024, Code of Civil Procedure, to take such evidence, upon interrogatories to be propounded to the witness orally; upon the taking of which each party may appear before the commission, in person or by attorney, and interrogate the witness. The party desiring such testimony shall give to the other the following notice of the time and place of taking the same, to wit, ten days, and one day in addition thereto (Sundays included) for every three hundred miles' travel from the place

of holding the court to the place where such deposition is to be taken.

When a party to a suit shall give the opposite party notice to take a deposition upon oral interrogatories, and shall fail to take the same accordingly, unless such failure be on account of the nonattendance of the witness, not occasioned by the fault of the party giving the notice, or some other unavoidable cause, the party notified, if he shall attend himself or by attorney; agreeably to the notice, shall be entitled to two dollars per day for each day he may attend under such notice, and to six cents per mile for every mile that he shall necessarily travel in going to and returning from the place designated to take the deposition, to be allowed by the court where the suit is pending, and for which execution may issue. (In effect 60 days from March 21, 1903.)

**§ 2026. Commission—Oath and Certificate.**

The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

jury, to be inserted at the foot of the indictment or indorsed thereon: *People v. Northey*, 77 Cal. 613, 19 Pac. 865, 20 Pac. 129.

On the trial of an indictment, the reporter's notes of the testimony given on the trial of a former indictment for the same offense, by a witness shown to be out of the state, are inadmissible in evidence: *People v. Ah Chue*, 57 Cal. 567.

A transcript of the shorthand reporter's notes in a criminal case, certified as provided in section 869 of the Penal Code, is placed upon the same footing as a deposition and is admissible in like cases: *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

By an act of the legislature, the reporter's notes, taken before a committing magistrate upon a preliminary examination for felony, are made prima facie evidence of the testimony given; but held, that such notes were inadmissible where the testimony was taken through an interpreter: *People v. Lee Fat*, 54 Cal. 527.

Under section 869 of the Penal Code, the reporter's transcript of the notes taken by him at an examination of a prosecuting witness before the committing magistrate must be certified to be a correct statement of the testimony and proceedings, and not merely that it is a full, true and correct transcript of the shorthand notes. The certificate must be correctly written, and its absence cannot be supplied by parol evidence so as to make the transcript admissible; though it would be a proper course to have the reporter refresh his memory, and testify orally as to what occurred at the examination: *People v. Carty*, 77 Cal. 213, 19 Pac. 490.

#### **Requisite Showing.**

Certain depositions were taken on behalf of the plaintiff under subdivision 2 of section 2021 of the Code of Civil Procedure. The attorney for the defendant was present, and cross-examined the witness. Before the depositions were offered, it was shown that when they were taken the witnesses resided in the county of Alameda, and that they con-



tinued to reside there at the time of the trial. The action was brought and the trial had in the city and county of San Francisco. The depositions were admitted against the objection of the defendant to the sufficiency of the showing as to the absence of the witnesses. Held, that no error was committed in overruling the objection: *Sunol v. Molloy*, 63 Cal. 369, 370.

### **Depositions on Preliminary Examination.**

The deposition of an absent witness, taken at the preliminary examination, may be used at the trial in a case of homicide, and its admission is not in violation of section 13 of article 1 of the constitution of the state: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

Error in admitting depositions in evidence, without preliminary proof that the witnesses resided out of the county where the cause was being tried, is waived if the party against whom the depositions were offered, dispensed with the formal proof of such fact on the trial, and accepted the verbal statement of the opposing counsel as to their nonresidence: *Estate of Learned*, 70 Cal. 140, 11 Pac. 587.

The court was justified in finding that the witness A could not, with reasonable and due diligence, be found in the state; his deposition taken before the examining magistrate was therefore admissible: *People v. Gannon*, 61 Cal. 476.

The showing that a witness is out of the state is sufficient to admit his deposition if it appear that, in answer to inquiries made at his former place of business, and of others who knew him, it was said they did not know where he was, but understood that he was out of the state: *Renton v. Monnier*, 77 Cal. 449, 19 Pac. 820.

A deposition taken under section 882 of the Penal Code, pending an information upon a void commitment, which is set aside, is not taken in any pending case, there being no jurisdiction in the superior court to try the defendant, and such deposition cannot be

*Cross-references:*

Manner of issuing commission, section 2024; form of oath, sections 2094-2096; deposition must be taken in the form of question and answer, section 2006; deposition must be upon interrogatories, section 2025; parties may agree to take deposition without interrogatories, sections 2006, 2025; certificate of deposition within the state, section 2032; who may use deposition, section 2028; officer authorized to take testimony is authorized to administer oath, section 2093.

**Certificate to Deposition.**

It was held that the certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute: *Williams v. Chadbourne*, 6 Cal. 559.

Where the certificate did not state that the depositions were read to the witnesses before signing (section 2032), but that the depositions were corrected by the notary under the direction of the witnesses, this was held sufficient: *Higgins v. Wortell*, 18 Cal. 333.

The omission of the commissioner to append a date to his final certificate was held of no consequence where, at the end of the deposition, there was a certificate signed by the commissioner in the ordinary form, to the effect that the deposition was sworn to and subscribed by the witness on a particular day, following which, without further date, was a further certificate as to a compliance with the provisions of section 430 of the practice act: *Elgin v. Hill*, 27 Cal. 373.

' There is no necessity for the statutory certificate to be appended to the deposition of each witness: *Pralus v. Pacific etc. Min. Co.*, 35 Cal. 30.

**Commissions, How Returned in Criminal Cases.**

Unless the parties otherwise consent, by an indorsement upon the commission, the court or judge must indorse thereon a direction as to the manner in which it must be returned, and may in his discretion, direct that it be returned by mail or other-

wise, addressed to the clerk of the court in which the action is pending, designating his name and the place where his office is kept: Pen. Code, 1356.

### **Commissions, How Executed in Criminal Cases.**

The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth.

2. He must cause the examination of the witness to be reduced to writing, and subscribed by him.

3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth.

4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated.

5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the commissioner.

6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal, and address it as directed by the indorsement thereon.

7. If there be a direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest postoffice. If any other direction be made by the written consent of the parties, or by the court or judge, on the commission, as to its return, the commissioner must comply with the direction.

A copy of this section must be annexed to the commission. (Amendment, approved March 30, 1874;

Amendments 1873-74, p. 451. In effect July 1, 1874.) Pen. Code, 1357.

**Commission in Criminal Cases May be Returned by Agent.**

If the commission and return be delivered by the commissioner to an agent, he must deliver the same to the clerk to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it. (Amendment, approved April 9, 1880; Amendments 1880, p. 28. In effect April 9, 1880.) Pen. Code, 1358.

**Return of Commission Where Agent is Unable to Deliver It.**

If the agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent; that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the commissioner: Pen. Code, 1359.

**Opening and Filing Commission.**

The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending. If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the postoffice, and open and file it in his office, where it must remain, unless otherwise directed by the court or judge: Pen. Code, 1360.

**Commission Must be Open to Inspection.**

The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or of any part thereof, on payment of his fees: Pen. Code, 1361.

**§ 2027. Postponement of Trial for Nonreturn of Deposition.**

A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

*Cross-references:*

Postponement where judge or jury are witnesses, section 1883.

**Postponing Trial for Nonproduction of Evidence.**

A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it: Code Civ. Proc., 595.

**§ 2028. Either Party May Use Deposition.**

The deposition mentioned in this article may be used by either party on the trial or other proceeding against any other party giving or receiving the notice, subject to all just exceptions.

*Cross-references:*

Deposition may be read by any party in the same or any other action and when read is deemed the evidence of the party reading it, section 2034; depo-

sition taken within the state may be read by either party at the trial, section 2032.'

**The Deposition May be Used, How.**

It is error to permit a party to introduce in evidence selected portions of the deposition of his own witness upon direct examination, omitting the rest of the deposition. The code provides that "the deposition" may be used; and it cannot be inferred that it was the intention to permit portions of it to be used, to the exclusion of other portions: *Bank of Orland v. Finnell*, 133 Cal. 475, 65 Pac. 976.

**Depositions Under Commission in Criminal Cases,  
How Used.**

The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court: *Pen. Code*, 1362.

## ARTICLE V.

## MANNER OF TAKING DEPOSITIONS IN THIS STATE.

## § 2031. Notice of taking depositions within the state.

Depositions in criminal cases are constitutional.

Depositions when admissible in criminal cases.

Depositions of witness about to leave the state in criminal cases.

Conditional deposition of witness who is unable to give bail.

Notice.

Stipulations as to.

Order shortening time of notice.

## § 2032. Manner of taking deposition—When may be revised.

Conditional examinations in criminal cases.

Admissibility.

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Objections to depositions.

Presence of witness at trial.

Presumption on appeal.

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Depositions subject to all objections except as to the form of the interrogatory.

Transcribing.

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## § 2033. Excluding deposition for insufficient notice.

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- § 2036. Subpoena to testify.
- § 2037. Taking testimony where no commission issued.
- § 2038. Testimony—How taken.  
Testimony taken in shorthand.

**§ 2031. Notice of Taking Depositions Within the State.**

Either party may have the deposition taken of a witness in this state, in either of the cases mentioned in section 2021, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribed a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.

*Cross-references:*

Cases in which depositions may be taken in this state, section 2021; when deposition may be taken



out of the state, section 2020; manner of taking deposition out of the state, sections 2024-2028; deposition defined, section 2004; manner of taking deposition within the state, section 2032; who may use deposition, section 2032; when deposition excluded for unfairness, section 2033; subpoena to take deposition, section 1986; perpetuation of testimony of witness in the state, section 2085; officer authorized to take deposition is authorized to administer oaths, section 2093.

See Jones on Evidence, sections 673-682.

Depositions under state statutes—General mode of taking, sections 673, 674.

Statutes to be complied with, section 675.

How compliance with the statute is to appear, section 676.

Notice of taking—Time, section 678.

Same—Names of witnesses, officer, etc., section 679.

Notice—On whom served, section 680.

Same—Place of taking, section 681.

Mode of taking—Reducing to writing, section 682.

### **Depositions in Criminal Cases are Constitutional.**

The constitution provides that "the legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial": Const., art. 1, sec. 13.

### **Depositions, When Admissible in Criminal Cases.**

In a criminal action the defendant is entitled—

3. To produce witnesses on his behalf, and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his

appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state: Pen. Code, 686.

#### **Depositions of Witnesses About to Leave the State in Criminal Cases.**

The application must be made upon affidavit, stating—

1. The nature of the offense charged.
2. The state of the proceedings in the action.
3. The name and residence of the witness, and that his testimony is material to the defense of the action.
4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial: Pen. Code, 1337.

The application may be made to the court, or to a judge thereof, and must be made upon three days' notice to the district attorney. (Amendment, approved March 12, 1880; Amendments 1880, p. 5. In effect March 12, 1880.) Pen. Code, 1338.

If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and that a copy of the order be served on the district attorney, within a specified time before that fixed for the examination: Pen. Code, 1339.

#### **Conditional Deposition of Witness Who is Unable to Give Bail.**

When, however, it satisfactorily appears by examination, on oath, of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf

of the people. Such examination must be by question and answer, in the presence of the defendant, or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this code to be conducted, and the witness thereupon be discharged; but this section does not apply to an accomplice in the commission of the offense charged. (Amendment approved March 14, 1878; Amendments 1877-78, 122. In effect March 14, 1878.) Pen. Code, 832.

### **Notice.**

A notice of the taking of a deposition in the city of San Francisco, which did not specify any place in the city where it would be taken, held, insufficient: *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183.

A slight error in title of cause, where there is no other suit pending between the parties, will not invalidate the notice to take a deposition: *Mills v. Dunlap*, 3 Cal. 94.

Reasonable notice should be given of the time and place of taking testimony, but what is reasonable notice depends on the particular circumstances: *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.

Under the practice act, as it existed before the adoption of the Code of Civil Procedure, a notice to take a deposition was required to be served on the attorney for the other party, even if he lived out of the county where the case was pending. A service on the party himself was not sufficient: *Griffith v. Gruner*, 47 Cal. 644.

The service of a notice to take depositions may be proved by oral testimony: *Hobbs v. Duff*, 43 Cal. 485.

Proof of notice to take a deposition where the written notice was defective was held good when made by parol, and it conforms substantially to the statute: *Mills v. Dunlap*, 3 Cal. 94.

### **Stipulations as to.**

A deposition taken under a stipulation which provides for the admission of the deposition without conditions is governed by the stipulation, and not

by the statutory provisions: *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

In an application for a commission to take the deposition of a witness residing out of the state it is sufficient to serve on the opposite party the copy of an order of the court or judge requiring a party to show cause on a day named why a commission should not issue. No other notice is required. If the day named is less than the five days required for notice by the statute, the order and the issuing of the commission are equivalent to an order shortening the time: *Dambmann v. White*, 48 Cal. 439.

#### **Order Shortening Time of Notice.**

An order shortening the time for which notice of the taking of a deposition shall be given must designate a definite time of notice: *Howell v. Howell*, 66 Cal. 390, 5 Pac. 681.

An order providing for the taking of a deposition at a certain hour of the day on which the order was made, and directing a service of the notice "forthwith," is not sufficiently definite: *Howell v. Howell*, 66 Cal. 390, 5 Pac. 681.

#### **§ 2032. Manner of Taking Deposition—When May be Used.**

Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties

in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions 2, 3, and 4, of section 2021, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

*Cross-references:*

Deposition in foreign state must be in form of question and answer, section 2006; certificate to deposition taken before commissioner, section 2026; deposition taken without the state may be used against any party who has notice, section 2028; when deposition within the state may be taken, section 2021; testimony of deceased witness or witness out of the jurisdiction or unable to testify may be proven when given in former action between the same parties relating to the same matter, section 1870, subdivision 8; leading questions, section 2046; objections to evidence or address to the court, section 2102; when deposition excluded for unfairness, section 2033; officer taking testimony has authority to administer oaths, section 2093; no objection to form of interrogatories where parties attend exam-

ination of witness, on proceedings to perpetuate testimony, section 2088.

See Jones on Evidence, section 702—Control and use of depositions.

#### **Conditional Examinations in Criminal Cases.**

The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the district attorney of a copy of the order, if no counsel appear on the part of the people, the examination must proceed: Pen. Code, 1340.

If the district attorney or other counsel appear on behalf of the people, and it is shown to the satisfaction of the magistrate, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed: Pen. Code, 1341.

The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information: Pen. Code, 1343.

The deposition taken must, by the magistrate, be sealed up and transmitted to the clerk of the court in which the action is pending or may come for trial: Pen. Code, 1344.

#### **Admissibility.**

A deposition which is taken in an action, and is admissible in such action, is admissible in an action between their successors in interest upon the same subject and involving the same issues: *Briggs v. Briggs*, 80 Cal. 253, 22 Pac. 334.

A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial: *Turner v. McIlhaney*, 8 Cal. 575.

If, after depositions in a cause have been taken, an amended answer is filed, the deposition will not be

rejected as evidence on the trial on account of the filing of the amended answer, if the material issues made by both answers, as to the subject matter on which the depositions were taken, are substantially the same: *Pico v. Cuyas*, 47 Cal. 174.

A grantee who acquires title prior to the commencement of an action in the nature of a creditor's bill against the grantor and his predecessors in interest if made a party during the progress of the trial of the action, is not bound by depositions taken or testimony given in the action prior to his being made a party. And this is so, although the deed under which he claims was not recorded at the time of the commencement of the action, and although he acted as attorney for the other defendants when such depositions were taken, and the testimony was given, and as such attorney cross-examined the witnesses for his clients: *Lange v. Braynard*, 104 Cal. 156, 37 Pac. 868.

#### **Certificate to Deposition.**

Certificate to deposition must state that deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute: *Williams v. Chadbourne*, 6 Cal. 559.

It is not essential to the certificate of a notary to a deposition taken before him that it state that the deposition was read over to the witness before signing. But if the certificate state that the deposition was corrected by the notary, under the direction of the witness, it is a sufficient compliance with the statute, because showing, by necessary implication, that the deposition was either read to or examined by the witness: *Higgins v. Wortell*, 18 Cal. 330.

There is no necessity for statutory certificate to be appended to deposition of each witness when two or more give their depositions for the same party at the same time and before the same officer; but one certificate in due form, to all such depositions, when securely attached together, is sufficient: *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30.

If, at the end of a deposition taken by a commissioner out of the state, there is a jurat giving the

date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of a compliance with the four hundred and thirtieth section of the practice act should be dated: *Elgin v. Hill*, 27 Cal. 372.

If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the commissioner, it is not necessary that the commissioner state in his certificate the day the same was taken: *Elgin v. Hill*, 27 Cal. 372.

Section 2032 of the Code of Civil Procedure, requiring the certificate to a deposition to state that the deposition, when completed, was read over to the witness and corrected by the witness if so desired, applies only to depositions taken in this state, and not to depositions taken out of the state: *St. Vincent's Inst. for Insane v. Davis*, 129 Cal. 20, 61 Pac. 477.

### **Objections to Depositions.**

Objection to a deposition cannot be made unless taken when it is offered in evidence: *Hobbs v. Duff*, 43 Cal. 485; *Jones v. Love*, 9 Cal. 70; *Mills v. Dunlap*, 3 Cal. 94.

A motion to suppress the reading of a deposition before the case in which it was taken is put upon trial is premature; the proper time to object to such deposition is when it is offered in evidence on the trial: *Mills v. Dunlap*, 3 Cal. 94; *Ramsay v. Chandler*, 3 Cal. 90.

When an exhibit to a deposition is objected to when produced by the witness, and the objection noted in the deposition, but there is nothing in the records to show that the objection was renewed at the trial or passed upon by the court below, it cannot be raised for the first time on appeal: *Parrott v. Byers*, 40 Cal. 614.

Where a rule of the district court requires three days' written notice of exceptions to depositions, if they are returned and filed with the clerk that length of time before trial, and such notice is not given on a first trial, the deposition may be admitted on a sec-



ond trial, though it took place the day after the first trial. The party was in default in not giving the notice before the first trial: *Myers v. Casey*, 14 Cal. 542; *Higgins v. Wortell*, 18 Cal. 331.

It is no objection to a deposition taken in this state, where only the party taking the same appears, that it is a narrative form, and is not taken by question and answer: *Pralus v. Pacific C. S. M. Co.*, 35 Cal. 30.

There is nothing in the statute that requires that exceptions to depositions shall be filed before the time of trial. The objection can be made at any time before the depositions are read in evidence: *Dye v. Bailey*, 2 Cal. 383.

The deposition taken on the preliminary examination sufficiently shows the grounds on which the magistrate sustained an objection to a question put to a witness, when it appears therefrom that the objection to the question was that it was "irrelevant and immaterial," and the objection as made was sustained: *People v. Riley*, 75 Cal. 98, 16 Pac. 544.

The defendant annexed two interrogatories proposed by the plaintiff and attached to the commission certain objections, but it did not appear that he brought them to the attention of the court, and had a ruling thereon at the trial. The supreme court held there was no ground for saying that the court erred in overruling these objections: *Farrell v. Palmer*, 36 Cal. 191.

If the magistrate taking a deposition erroneously excludes a question asked, the error does no injury if the testimony sought to be elicited be immaterial: *People v. Kent*, 50 Cal. 137.

Answers to interrogatories contained in a deposition, if based upon statements made by other persons to the witness, are hearsay, and should be stricken out on motion: *Amann v. Lowell*, 66 Cal. 306, 5 Pac. 363.

If, in a deposition, an answer be not responsive to the interrogatory, it may be stricken out: *Golden Gate etc. Co. v. Joshua Hendy Machine Works*, 82 Cal. 184, 23 Pac. 45.

An objection to the admission in evidence of a deposition, on the grounds that the witness had neglected to answer certain interrogatories put by the party objecting, and that the deposition was not complete or responsive, in order to be available, must call the attention of the court to the particular interrogatories which the witness had refused to answer, or the answer to which was evasive or not fully responsive: *Gassen v. Hendrick*, 74 Cal. 444, 16 Pac. 242.

Where the affidavit or notice in which it is sought to take a deposition is insufficient, the remedy is by objection to the deposition when offered in evidence: The court cannot quash the subpoenas: *Pfister v. Superior Court*, 64 Cal. 400, 1 Pac. 492.

#### **Presence of Witness at Trial.**

Where the deposition of the plaintiff is taken before the trial, under subdivision 1 of section 2021 of the Code of Civil Procedure, it cannot be rightfully rejected as evidence for the defendant, on the sole ground that the plaintiff was present in court and examined as a witness, and cross-examined by the defendant at the trial; and the provision to that effect, found in section 2032 of that code, does not apply to subdivision 1 of section 2021: *Adams v. Weaver*, 117 Cal. 42, 49; *Newell v. Desmond*, 74 Cal. 46, 47.

#### **Presumption on Appeal.**

Where the notice of the taking of a deposition and the certificate of the notary thereto were not set out in the record upon appeal, the indorsement of the notary on the back of the envelope, showing a misnomer of the witness whose deposition was taken is extraofficial, and forms no part of the document and cannot be considered; and it must be presumed upon appeal in favor of the judgment that the notice and certificate were in due form, and stated the name of the witness correctly: *Wise v. Collins*, 121 Cal. 147, 152.

#### **Reading of Portions of Deposition.**

It is error to permit a party to introduce in evidence selected portions of the deposition of his own

witness upon direct examination omitting the rest of the deposition. The code provides that "the deposition" may be used; and it cannot be inferred that it was the intention to permit portions of it to be used, to the exclusion of other portions: *Bank of Orland v. Finnell*, 133 Cal. 475, 477.

#### **Deposition Need not be Used.**

When depositions have been taken, the party upon whose application they were taken is not bound to offer them in evidence at the trial, but may resort to other evidence. Failure to use the depositions is not a ground of surprise, for which a new trial should be granted: *Heath v. Scott*, 65 Cal. 548, 4 Pac. 557.

#### **Depositions Subject to All Objections Except as to the Form of the Interrogatory.**

Depositions are subject to all legal exceptions at trial, save only the objection to the form of an interrogatory where the parties attend the examination: *Lawrence v. Fulton*, 19 Cal. 683.

Depositions are taken subject to all legal exceptions except as to the form of the interrogatory; and, when read upon a retrial of an action, the parties are at liberty to interpose new objections: *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101.

A stipulation for the taking of the depositions, under a commission and interrogatories of parties plaintiff, subject to all objections as to the propriety, relevancy, and materiality of the interrogatories, does not waive objections of the defendants to the contents of the depositions on the ground that testimony was given of facts which occurred before the death of the decedent whose estate is represented by the defendants: *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

When the deposition of a witness is taken, objections to his competency must be taken at the time and not reserved till the trial, or they will be deemed waived: *Jones v. Love*, 9 Cal. 68; *Brooks v. Crosby*, 22 Cal. 42.

Where parties stipulated that depositions which had been taken in another action should be used on the trial "with the same force and effect, and subject to the same exceptions, as if taken in this case," held, that the stipulation was a waiver of any objection to the competency of the witness: *Brooks v. Crosby*, 22 Cal. 42.

Where both parties were present at the taking of a deposition, the objection that questions were leading must be taken at the time of the interrogatory, and if no objection was then made to the form of the interrogatory, it cannot be urged at the trial: *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791.

#### **Transcribing.**

The notary taking a deposition may either appoint a clerk or a shorthand reporter to take down the testimony; and the fact that such reporter was not appointed by the court and that his transcript of the testimony into longhand was objected to by the defendant's counsel, is immaterial, if the certificate of the notary states that the transcription into longhand was by the notary carefully read to the witness, and, being by him first corrected, was subscribed by the witness in the presence of the notary: *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791.

#### **Exhibits.**

Promissory notes offered in evidence, after being identified and proved by testimony contained in a deposition, are not parts of the deposition within the meaning of section 612 of the Code of Civil Procedure, prohibiting the jury from taking depositions with them when retiring for deliberation: *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

In an action against a defendant who is the president of a mining corporation, to enforce his personal liability for lumber sold, the minute-book of the corporation referred to in the deposition of the defendant, but not attached to the deposition nor returned with it, cannot be read in evidence without proof of its identity: *Bradford v. Woodworth*, 108 Cal. 684, 41 Pac. 797.

### § 2033. Excluding Deposition for Insufficient Notice.

Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

#### *Cross-references:*

Manner of taking deposition within the state, section 2032; notice of taking deposition within the state, section 2031; objection to form of the interrogatories must be taken at the time, section 2032; subpoena to compel attendance of witness, section 1986.

See Jones on Evidence, sections 704-711.  
Suppression of depositions, section 704.  
Grounds for suppression, section 705.  
Same—Where party is deprived of right of cross-examination, section 706.  
Same—Refusal of witness to answer, section 707.  
Suppression for noncompliance with statute, section 708.  
Depositions not suppressed for mere irregularities, section 709.  
Suppression of parts of depositions, section 710.  
Same—Miscellaneous, section 711.

#### **Notice of Place.**

A notice of the taking of a deposition in the city of San Francisco, which did not specify any place in the city where it would be taken, held, insufficient: Lucas v. Richardson, 68 Cal. 618, 621.

#### **Sufficiency of Notice.**

It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken before the county clerk; Williams v. Chadbourne, 6 Cal. 559.

Notice of time and place of taking a deposition having been given it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule: *Williams v. Chadbourne*, 6 Cal. 559.

#### **Depositions Taken Ex Parte.**

Where a deposition is taken *ex parte*, though after notice, and the witness is, therefore, not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it: *Spring v. Hill*, 6 Cal. 17.

#### **§ 2034. Deposition May be Read by Either Party.**

When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it.

#### *Cross-references:*

Deposition taken without the state may be used against any party who has notice, section 2028; testimony of deceased witness or witness out of the jurisdiction or unable to testify may be proved in subsequent action, section 1870, subdivision 8; deposition may be used in case of death of witness, section 2032; either party may read deposition on the trial, section 2032.

See *Jones on Evidence*, sections 699, 702.  
Control and use of depositions, section 702.  
Use in other actions, section 699.

#### **Read by Either Party.**

The deposition, or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness, or infirmity,

or of his continued absence from the state. Upon reading the deposition in evidence, the same objections may be taken to a question or answer contained therein as if the witness has been examined orally in court: Pen. Code, 1345.

**Failure to Use Deposition as Ground of Surprise.**

When depositions have been taken, the party upon whose application they were taken is not bound to offer them in evidence at the trial, but may resort to other evidence. His failure to use the depositions is not a ground of surprise for which a new trial should be granted: *Heath v. Scott*, 65 Cal. 548, 552.

**Successors in Interest.**

A deposition which is taken in an action, and is admissible in such action, is admissible in an action between their successors in interest upon the same subject and involving the same issues: *Briggs v. Briggs*, 80 Cal. 253, 254.

**§ 2035. Who May Take Depositions to be Used Without the State.**

Any party to an action or special proceeding in a court, or before a judge, of a sister state, may obtain the testimony of a witness residing in this state, to be used in such action or proceeding, in the cases mentioned in the next two sections.

*Cross-references:*

Procuring witness on commission from sister state, section 2036; scope of term of sister state, section 1924; issuing subpoena where commission has not issued, section 2037.

See *Jones on Evidence*, section 685—Comity between states.

**Authority of Commissioner.**

A commissioner to take testimony has no authority to take the testimony of any person other than those named in the commission, and a misnomer of the Christian name of a witness will render the deposition as to him *ex parte*, and inadmissible in evidence: *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206.

Different names presumptively indicate different persons; and it cannot be shown, to justify the admission of a deposition taken under commission, that a name inserted therein was intended to designate a witness bearing a different name, if it does not appear that the identity was known by or communicated to the opposite party when the commission was issued: *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206.

**§ 2036. Subpoena to Testify.**

If a commission to take such testimony has been issued from the court, or a judge thereof, before which such action or proceeding is pending, on producing the commission to a judge of the superior court, with an affidavit satisfactory to him, of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place. [Amendment approved April 16, 1880; Amendments 1880, p. 115. In effect April 16, 1880.]

***Cross-references:***

Any party to action or proceeding in sister state may obtain testimony of witness residing in this state, section 2035; procuring testimony to be used in sister state where commission has not issued, section 2037; issuance of subpoena in general, section 1986; commissioner is authorized to administer oath, section 2093.



### § 2037. Taking Testimony Where No Commission has Issued.

If a commission has not been issued, and it appear to a judge of the superior court, or to a justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;

2. That a commission to take the testimony of such witness has not been issued;

3. That, according to the law of the state where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding; he must issue his subpoena requiring the witness to appear and testify before him at a specified time and place. [Amendment approved April 16, 1880; Amendments 1880, p. 115. In effect April 16, 1880.]

#### *Cross-references:*

Taking testimony to be used in sister state where commission has issued, section 2036; issuance of subpoena generally, section 1986; testimony need be taken in writing, section 2038.

### § 2038. Testimony—How Taken.

Upon the appearance of the witness, the judge or justice must cause his testimony to be taken

in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state requires.

*Cross-references:*

Sister state includes territory, section 1924; any party to an action or proceeding in a sister state may procure testimony of witness residing in this state, section 2035; testimony how taken under commission, section 2036; issuing subpoena where no commission has issued, section 2037.

**Testimony Taken in Shorthand.**

It cannot be objected to a deposition that the notary employed a shorthand reporter to take down the testimony, if the transcript thereof in longhand was read to the witness and corrected before it was subscribed: *Kyle v. Craig*, 125 Cal. 197, 57 Pac. 791.

## ARTICLE VI.

## GENERAL RULES OF EXAMINATION.

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- § 2049. Party producing witness not allowed to impeach him.  
Party may not impeach character of his own witness.  
Party is bound by testimony of his own witness.  
Party may impeach his own witness by evidence of contradictory statements.  
Contradiction of witness by proof of inconsistent statements.  
Party may contradict his own witness.
- § 2050. Re-examining and recalling witnesses.  
Re-examination is subject to discretion of the court.  
— Repeated examination on same point.  
Permitting recall of witness is discretionary.
- § 2051. Witness—How impeached.  
General reputation.  
Evidence of character or reputation for truth and veracity.  
Conviction of felony.  
Felony, conviction, introducing record.  
Misdemeanor conviction.  
Contradictory statements.  
Other methods of impeachment.  
Improper impeaching matters.  
Specific immoral acts.  
Particular wrongful acts.  
Party as witness may be impeached.  
Objection to impeaching evidence.
- § 2052. Prior inconsistent statements.  
Contradiction of witness by proving different statements or declarations.  
Contradiction by proof to the contrary.  
Laying a foundation.  
Laying foundation—How waived.  
Jury the judge of the impeachment.  
Contradictory pleadings.  
Impeachment on former trials.  
Witness cannot be contradicted on immaterial matters.  
Impeachment on collateral matters.

Impeachment contradicting on immaterial matters is harmless when.

Right to explain testimony.

Contradictory statements—Exact language not necessary.

Contradictory statements must be prior.

Purpose of impeaching testimony.

Impeaching testimony cannot be used to make affirmative case.

Consistent statements.

Contradicting witness by statements of third persons.

Impeaching witness—Testimony at former trial.

Deposition on preliminary examination.

§ 2053. Evidence of good character.

Evidence of good character of witness not admissible before his character has been impeached.

Evidence of good character of witness admissible after his character has been impeached.

Character must be proven by reputation.

§ 2054. Right to inspect writing shown witness.

Right of inspection—Writing shown witness may be inspected by opposite party.

§ 2042. Order of Proof.

The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

*Cross-references:*

Proof of partnership, agency, joint ownership, joint debtorship or conspiracy as foundation for admission of declaration of partner, agent, joint owner, joint debtor or conspirator, section 1870, subdivision 5, section 1870, subdivision 6; explanations of alterations

of written instrument, section 1982; proof of absence, infirmity or death of witness to admit deposition, section 2032; direct-examination must be completed before cross-examination begun, section 2045; laying foundation to admit lost or destroyed instrument, sections 1855, 1937; proof of lost will, section 1969; admission of partial evidence, section 1834; court may control mode of interrogations, section 2044; direct and cross-examination defined, section 2045; recalling witness, section 2050; proof of good character inadmissible until character attacked, section 2053.

See Jones on Evidence, sections 809-814.

Order of proof—Discretion of court—Evidence not to be given piecemeal, section 809.

Same—Relaxation of the rule discretionary—Illustrations, section 810.

Same—Discretion of court—Review, section 811.

Privilege allowed counsel as to order of proof, section 812.

Must the relevancy of the proof appear at the time, section 813.

Further illustrations of discretion of the court in conducting trial, section 814.

### **Party Beginning Must Exhaust His Case.**

Where, upon the trial of a defendant accused of the murder of his wife, the defendant proved evidence tending to prove the defense of insanity, and the prosecution, to rebut the inference of insanity, offered the expert evidence of a physician, who, in response to a hypothetical question, gave it as his opinion that defendant was sane at the time of the homicide, such opinion is not new matter, but simply matter in contradiction of defendant's evidence, and the defendant is not entitled to offer in rebuttal the opinion of another expert to the contrary, such evidence being properly part of defendant's evidence in chief: *People v. Hill*, 116 Cal. 562, 48 Pac. 711.

A plaintiff cannot keep back all his testimony on material point until he draws out the testimony of the other party and then introduce it, and, if he does so reserve his testimony, the court will not allow him

to come in and make out his case after the defendant rests: *Kohler v. Well*, 26 Cal. 606.

If plaintiff anticipate defense, and offer testimony in rebuttal of it, the court may, in its discretion, refuse to admit, after the defendant has closed his case, further testimony in rebuttal which is merely cumulative: *Casey v. Le Roy*, 38 Cal. 697.

In action for money loaned, evidence of admissions of indebtedness by the defendant should be properly introduced as a part of the plaintiff's original case, and the rejection of such evidence when offered in rebuttal is not error, if the plaintiff does not ask to be permitted to reopen his case for the purpose of introducing it: *Young v. Brady*, 94 Cal. 128, 29 Pac. 489.

If the plaintiff in ejectment relies on title by possession he cannot introduce evidence on that point and rest, and then, if the defendant proves a prior possession, introduce evidence of a still older possession in himself by way of rebuttal: *Valentine v. Mahoney*, 37 Cal. 389.

Defendant is not entitled to offer proof of affirmative matter set up in his answer until the plaintiff has made his case and submitted it to the court: *Haines v. Snedegar*, 110 Cal. 18, 42 Pac. 462.

#### **Discretion of Court.**

The mere order in which evidence may be introduced is very much in the discretion of the court, and will not be interfered with by the appellate court, except in cases of abuse and discretion: *Bates v. Tower*, 103 Cal. 404, 37 Pac. 385.

The order in which testimony shall be admitted is within the discretionary powers of the court before whom the case is tried: *Gordon v. Searing*, 8 Cal. 49; *People v. Shainwold*, 51 Cal. 468.

Party is at liberty to introduce his evidence in whatever order he prefers, subject to the control of the court in the exercise of a sound discretion: *Crosett v. Whelan*, 44 Cal. 200.

The reception of testimony out of its proper order is a matter in the discretion of the court which tries the case, and except in a case of manifest abuse of



that discretion the appellate court will not disturb the ruling of the lower court in that respect: *Lick v. Diaz*, 37 Cal. 437.

**Admission on Statement that Relevancy will be Shown.**

If counsel assures the court that he will subsequently show the relevancy of evidence, the court may temporarily refuse to strike it out: *People v. McLean*, 84 Cal. 480, 24 Pac. 32.

If in such case the counsel fails to show that the evidence is relevant, and the court strikes it out, it is not error to fail to caution the jury in regard to it, unless the opposing counsel ask for it: *People v. McLean*, 84 Cal. 480, 24 Pac. 32.

Where testimony is received, subject to be afterward struck out on motion, if no such motion is made, the party objecting must be deemed to have acquiesced in the evidence remaining before the jury: *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625.

It is error for a court not to pass upon an objection made to the admissibility of evidence, which was taken subject to a subsequent ruling as to such admissibility: *Raymond v. Glover*, 122 Cal. 471, 55 Pac. 393.

Where maps are admitted subject to further proof that they were made and recorded by a real owner of the land, or for a limited purpose, as explanatory diagrams, objection is waived if there is no motion to strike them out for want of further evidence: *City of Napa v. Howland*, 87 Cal. 84, 25 Pac. 247.

In an action upon a promissory note, where the defendants, being guarantors, set up an agreement with the maker, under which they indorsed the note, upon a certain condition which was afterward violated, and on the trial offered evidence in support of the agreement, against objections by the plaintiff that the testimony was irrelevant until after it had been shown either that the plaintiff took the note with notice or acquired it after maturity, the court deciding that the defendants might introduce their evidence in whatever order they preferred, subject to be ruled out afterward, unless its relevancy could be shown, there was no abuse of the discretion of the court: *Crossett v. Whelan*, 44 Cal. 200.

**Effect of Introducing Evidence Out of Its Proper Order.**

The bare fact that evidence is brought to the notice of the jury out of its regular order is no ground for a new trial, if the evidence would have been competent in any stage of the trial: *Rice v. Cunningham*, 29 Cal. 492.

A bill of exchange being prima facie evidence of a sufficient consideration, where its consideration is in issue, evidence to prove consideration should be offered in rebuttal and not in chief; but where it is offered in chief, and not objected to on the ground that it is offered out of the proper order, or that it could properly be offered only in rebuttal, its admission as evidence in chief is a harmless irregularity: *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283.

**Order of Proof is in General Immaterial.**

A party may introduce his proof in his own order, and is not required to exhibit the whole of it, before he can introduce any particular item. It suffices if the item of proof offered tend to establish any one point involved in the issue: *Palmer v. McCafferty*, 15 Cal. 334.

Court will not control the order of proof unless some injury will be done: *Jackson v. Feather River Water Co.*, 14 Cal. 18.

The assignee of a contract who claims under it may introduce it in evidence before giving proof that the opposite party had notice of its assignment: *Doll v. Anderson*, 27 Cal. 248.

**Pleas in Abatement.**

In an action of ejectment, where, in addition to the defense of abatement by reason of the pendency of a former action the defendant relies upon other defenses, which go directly to the merits of the cause, it is the better practice for the trial court to require the defendant to present his evidence upon his plea in abatement at the opening of his defense: *Leonard v. Flynn*, 89 Cal. 535, 23 Am. St. Rep. 500, 26 Pac. 1097.

**Criminal Cases. '**

The jury having been impaneled and sworn, the trial must proceed in the following order, unless otherwise directed by the court:

The district attorney, or other counsel for the people, must open the cause and offer the evidence in support of the charge.

The defendant or his counsel may then open the defense, and offer his evidence in support thereof. '

The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case: Pen. Code, 1093.

When the examination of witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined: Pen. Code, 866.

**Striking Out Evidence.**

Where the answer of a witness is not responsive to the question propounded to him, and is hearsay, it is proper to strike it out: Estate of More, 121 Cal. 609, 54 Pac. 97.

Where a witness makes an inconsequential remark as to his opinion, which precedes any objection thereto, the only proper mode of raising an objection is by motion to strike it out, and a ruling upon a mere objection to the remark will not be considered as prejudicial error: Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061.

Where evidence is admitted without objection, a motion to strike it out is properly denied: Evans v. Johnston, 115 Cal. 180, 46 Pac. 906.

It is not error to refuse to strike out the testimony of a witness called for the prosecution which had some relevancy to the issues in the case, and was not prejudicial to the defendant, nor to refuse to strike out testimony introduced without objection on cross-examination about matters testified to in chief: People v. Patterson, 124 Cal. 102, 56 Pac. 882.

**Asking Inadmissible Questions.**

The conduct of a district attorney in asking a witness who has testified as to the defendant's good character the question, "Don't you know, as a fact, that his wife procured a divorce from him on account of cruelty and inhuman treatment within the last two years?" cannot be said to be prejudicial to the rights of the defendant, where an objection was sustained to the question, and the jury were instructed to give no heed to it: *People v. Gordon*, 103 Cal. 568, 37 Pac. 534.

The attorney for the prosecution should not ask inadmissible questions for the purpose of exciting suspicions in the minds of the jurors prejudicial to the defendant, nor repeat a question to which an objection has been sustained, nor, during the trial, make remarks unjustly injurious to the defendant: *People v. Ryan*, 108 Cal. 581, 41 Pac. 451.

**Reopening Case for Further Testimony is Discretionary.**

Admission of evidence, even after party has had opportunity to offer it, and has failed, is matter of discretion, and the court ought generally, whenever the ends of justice require it, to admit the testimony: *Lisman v. Early*, 15 Cal. 199.

Where a defective power of attorney offered by plaintiff, was admitted under objection, and after plaintiff's evidence in chief was closed, the court allowed him to produce a sufficient power, held that its admission at that time was matter of discretion, not to be disturbed in the absence of a showing of abuse: *Foote v. Richmond*, 42 Cal. 419.

Reopening a case for the purpose of introducing evidence in support of a plea of once in jeopardy is a matter of discretion, and the refusal of the court is not reviewable: *People v. Ross*, 65 Cal. 104, 3 Pac. 491.

It is no error to allow plaintiff to introduce ferry license, after motion for nonsuit, as this is a matter within the discretion of the court in an action against a ferryman: *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135.

After plaintiff has closed his case in rebuttal, the court has discretion to permit the defendant, who had been present during the entire trial, to testify fully as to his defense: *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307.

A court may, in its discretion, allow a plaintiff, after defendants have closed their case, and before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence, nor is such action any ground for reversal, unless it appear that injustice has been done by an abuse of discretion: *Priest v. Union Canal Co.*, 6 Cal. 170.

It is the discretion of the court to allow plaintiff to introduce testimony after defendant has closed his evidence: *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745.

It rests in the discretion of the court to allow further evidence to be introduced after the testimony is closed: *Mowry v. Starbuck*, 4 Cal. 274.

After a motion for an order has been argued and submitted, the court may, at its discretion, set aside the order of submission and allow more evidence to be introduced: *Keys v. Warner*, 45 Cal. 60.

If, after the parties have introduced testimony on each side, and the case has been submitted to the court, the plaintiff amends his complaint by an amendment which does not change the issues raised by the denials in the answer filed before the amendment, the defendant is not entitled, as matter of right, to introduce more testimony upon the issues: *Ahrens v. Adler*, 33 Cal. 608.

The granting of a motion for leave to open a case before the final decision, and to introduce a deed in evidence which had been inadvertently omitted, is a matter resting in the discretion of the trial court, and its ruling will not be disturbed on appeal, unless there is a clear abuse of discretion: *McGrath v. Wallace*, 85 Cal. 622, 24 Pac. 793.

The action of the trial court in refusing to reopen an action after the close of the trial, for the purpose of allowing the introduction of additional evidence, is not an abuse of discretion, where there is no show-

ing of any excuse for not having produced the evidence at the trial: *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96.

Upon a criminal trial it is discretionary with the court to grant or refuse permission to the defendant to testify on her own behalf where request therefore is made after the evidence had all gone to the jury, and the court had proceeded with its charge to that body as to the law governing the case; and its action in refusing such request is not an abuse of its discretion: *People v. Christensen*, 85 Cal. 568, 24 Pac. 888.

If the defendant answers the complaint, and also files a cross-complaint asking for affirmative relief, and both parties introduce evidence on the cause of action set forth in the complaint, and submit the cause to the court, whether the defendant shall then be permitted to reopen the cause and introduce evidence in support of the cross-complaint is a matter resting in the discretion of the court: *Miller v. Sharp*, 49 Cal. 233.

Where a record, after a full inquiry as to its genuineness, is excluded from evidence, on the ground that it had been altered after it was made, the allowance of further evidence in relation to it is within the discretion of the trial court: *Kruse v. Chester*, 66 Cal. 353, 5 Pac. 613.

An application to open up a case for further evidence after the trial and submission of the case, and after the ordering of findings and a decree in the case, is addressed to the discretion of the court: *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 38 Pac. 92.

### **What is Proper Rebuttal.**

Plaintiff may properly be permitted to explain in rebuttal a telegram introduced by the defendant for the purpose of contradicting his testimony: *Bradford v. Woodworth*, 108 Cal. 684, 41 Pac. 797.

Witnesses for the prosecution should not be allowed to reiterate their testimony under the guise of rebuttal: *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 620.

**Rebuttal—Admission of Irrelevant Evidence on One Side does not Justify Admission on Other.**

Irrelevant evidence on one side does not justify irrelevant evidence on the other: *People v. Dye*, 75 Cal. 108, 16 Pac. 537.

The giving of irrelevant evidence by one party does not entitle the other to go into evidence in reply to it: *Donnelly v. Curran*, 54 Cal. 282.

The introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence upon the other side: *San Diego etc. Co. v. Meale*, 88 Cal. 50, 25 Pac. 977.

**Conspiracy—Testimony of Accomplice.**

The order of evidence prescribed by subdivision 6 of section 1870 of the Code of Civil Procedure, that the acts or declarations of a co-conspirator may be received after proof of the conspiracy, is not mandatory; but that section presents the proper order of proof, and it is only in exceptional cases that the court should exercise its discretion to allow a departure therefrom, when the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to present the evidence in intelligible form without first admitting the testimony of the accomplice: *People v. Compton*, 123 Cal. 403, 408.

**§ 2043. Exclusion of Witnesses.**

If either party requires it, the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

*Cross-references:*

See *Jones on Evidence*, section 807—Exclusion of witnesses from courtroom.

**Exclusion of Witnesses.**

Trial court may make order excluding from the courtroom all the witnesses but the witness under examination: *People v. Sprague*, 53 Cal. 491.

The exclusion of witnesses from the courtroom is within the discretion of the court: *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *People v. Hong Ah Duck*, 61 Cal. 387.

The exclusion of the witness on the part of the prosecution, on the motion of the defendant, in a criminal action, is not a matter of absolute right, but rests in the discretion of the court: *People v. Garnett*, 29 Cal. 622.

A party in interest, though not a party of record, should be allowed to be present at the trial, and should therefore be excepted from an order excluding witnesses from the courtroom during the trial: *Chester v. Bower*, 55 Cal. 46.

The circumstances of a witness in a criminal action having remained in court and heard the evidence of other witnesses, in disobedience to an order of the court excluding him from the courtroom while other witnesses were under examination, is no ground for rejecting his testimony. The witness in such case may be punished for contempt in disobeying the order; but a party cannot, without fault on his part, be deprived, for such disobedience, of the testimony of the witness: *People v. Boscovitch*, 20 Cal. 436.

It is within the discretion of the court, during the trial of a criminal case, to allow a particular witness to remain in the courtroom during the examination of the witnesses, the other witnesses being excluded: *People v. McCarthy*, 117 Cal. 65, 48 Pac. 984.

**Magistrate May Exclude Witnesses.**

While a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined: *Pen. Code*, 867.



### § 2044. Court to Control Examination—Cumulative Testimony.

The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; but subject to this rule the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

#### *Cross-references:*

Cumulative evidence defined, section 1838; witness must answer questions, section 2065; rights of witnesses, section 2066; witness may be protected from irrelevant questions, section 2066; material allegations only need be proven, section 1867; collateral questions should be avoided, section 1868; what evidence may be given upon trial, section 1870; reasonable doubt, section 2061, subdivision 5; oral examination defined, section 2005; definition of witness, section 1878.

See Jones on Evidence, sections 814-826.

Further illustrations of discretion of the court in conducting trial, section 814.

Leading questions—General rule, section 815.

Same—Case illustrating the rule, section 816.

Exceptions to the rule—Hostile witnesses—Introductory questions, section 817.

Same—As to facts not remembered—For purposes of contradiction, section 818.

Leading questions—Discretion of the court, section 819.

Cross-examination—On subject matter of direct examination, section 820.

Further discussion and qualification of the rule, section 821.

Same—Details may be called for—Questions showing improbability of direct testimony, section 822.

Facts that are part of *res gestae*, section 823.

Leading questions may be asked—As to new matter, section 824.

How long right to cross-examine continues, section 825.

More liberal rule as to relevancy on cross-examination, section 826.

Further illustrations of discretion of the court in conducting trial, section 814.

Number of witnesses, section 902.

### **Distinction Between Incompetency and Irrelevancy.**

There is a wide distinction between immaterial and incompetent evidence. Evidence may be material and tend to prove an issue, but incompetent under the rules of law for that purpose: *People v. Manning*, 48 Cal. 335.

### **Control of Conduct of Examination by the Court.**

Where a question put to the witnesses calls for a statement of fact which is near the border line of objectionableness, the trial court, in the exercise of its discretion in the conduct of the examination of witnesses, may properly sustain an objection thereto: *Alexander v. Central Lumber etc. Co.*, 104 Cal. 532, 38 Pac. 410.

The refusal of a trial court to request a witness during recess to ascertain a fact necessary to enable him to answer a question is not reviewable on appeal: *People v. Chin Hing Chang*, 74 Cal. 389, 16 Pac. 201.

A suggestion by the judge as to a permissible line of cross-examination of the defendant does not tend to show that the judge aided in the prosecution of the case; and where the counsel for the prosecution decided not to pursue such line, and the action of the judge was not excepted to, no error appears in that connection: *People v. Goodwin*, 132 Cal. 368, 64 Pac. 561.

Where the court cross-examined the defendant and other witnesses of its own motion, and made remarks and suggestions, to none of which acts of the court objection was made, or any exception taken by the defendant, it is too late upon appeal to raise questions touching such matters; and where an objection was taken to the interruption of a witness by the court, and no exception was reserved, it must be presumed upon appeal that the defendant was finally satisfied that the court was right: *People v. Bishop*, 134 Cal. 682, 66 Pac. 976.

The action of the court in striking out an answer of a witness, as not responsive to a question, is not ground for a reversal, where the answer was ambiguous and error in the court's construction of it is not clear, and the question could have been easily reframed so as to leave no doubt of the meaning of the witness: *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

#### **Manner of Examination.**

It is not an objectionable form of question to request a witness on his direct examination to state only what he knows about the matter: *Hicks v. Riverside Fruit Co.*, 72 Cal. 303, 13 Pac. 873.

On the examination of a witness counsel cannot insert in a question a statement as having been made by the witness which had not in fact been made by him: *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323.

#### **Limiting Number of Witnesses.**

Where the defendant introduces witnesses to impeach the credibility of one of plaintiff's witnesses, it is not an abuse of discretion in the court to limit him to eight witnesses, provided the plaintiff introduces no witnesses to sustain his credibility: *People v. Murray*, 41 Cal. 66.

#### **Offer of Proof.**

An offer of proof must be distinctly directed to some material fact; and if it is vague in this respect, it is not error for the court to reject it: *Smith v. East Branch Min. Co.*, 54 Cal. 164.

An offer of proof which is not directed to some specific material fact should be denied on account of its vagueness: *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243.

Where evidence is admissible, not generally, but for some specific purpose, an offer to introduce the evidence should designate the purpose, and a general offer of such evidence is properly denied: *Stevens v. San Francisco etc. P. R. R. Co.*, 100 Cal. 554, 35 Pac. 165.

When counsel make offer of evidence, they must offer to prove all facts which, taken in connection with the facts already proven, are necessary to render the offered evidence relevant, otherwise the court is justified in rejecting the offer: *Chamberlin v. Vance*, 51 Cal. 75.

Where defendant has not been called upon to state whether he expected to prove all facts essential to his defense his testimony should not be rejected, because his offer does not embrace every fact necessary to establish it: *Tyler v. Green*, 28 Cal. 406, 87 Am. Dec. 130.

If an offer is made to prove several facts, consecutively stated, and it does not distinctly appear that the offer was to prove all the facts as a whole or none of them, the presumption is that it was an offer to prove each fact seriatim: *Lick v. Diaz*, 37 Cal. 437.

A general offer to prove by the parol evidence of a witness certain facts which could only be proved by record or documentary evidence is properly refused, although the offer also embraced other matters not objectionable: *Bostwick v. Mahoney*, 73 Cal. 238, 14 Pac. 832.

If plaintiff offers competent testimony to prove certain facts, and it is rejected by the court on the objection of the defendant, the defendant will not afterward be permitted to allege that the plaintiff failed to prove the facts embraced in the offer: *Thompson v. McKay*, 41 Cal. 221.

The court has discretion to permit a formal offer of evidence to be made orally; and it is not an

abuse of discretion to overrule an objection that the offer should be in writing: *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

Where offered evidence is admissible for a specific purpose, but not generally, the trial judge, upon being requested to do so by the opposite party, should state the purposes for which it is to be received and considered by him, and his failure to do so is error: *Byrne v. Byrne*, 113 Cal. 294, 45 Pac. 536.

Although a mere general offer of evidence to prove a variety of things, without producing the witnesses or evidence whereby they are to be proved, is an improper method of presenting offered evidence, yet, where no objection is made to the form of the offer upon the ground that the offer was an improper method, but objection is only taken to the evidence offered, it will be presumed upon appeal that the method used in making the offer was by consent: *Biddie v. Kobler*, 110 Cal. 191, 42 Pac. 576.

#### **Documents not Formally Introduced.**

Where documents are not formally introduced in evidence, but it is apparent that the court and the offering party understood that the documents were in evidence, they must be so considered: *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. 336.

When the giving of a note and its contents are proved by witnesses without objection, the note is as much in evidence as if it had been proved by the production of the written instrument itself; and it is prejudicial error in such case to instruct the jury that the note is not in evidence before them: *People v. Mauritzen*, 84 Cal. 37, 34 Pac. 112.

If the plaintiff's counsel at the close of the testimony, states that he desires to have an original will, a copy of which is in the answer, go with the paper in evidence, in order that the court may inspect it, and defendants' counsel assents to it, saying he too wants it to go in evidence, this is putting the will in evidence for every purpose for which it is legitimate: *Pearson v. Pearson*, 46 Cal. 609.

The handing of the certificate of appointment of a guardian ad litem for infant plaintiffs to the clerk as an exhibit, with the declaration, "This is the paper in reference to the guardian ad litem," without further remark by either party, though not a formal way of putting the paper in evidence, will be considered as putting it in evidence, it appearing that all parties understood that it was in evidence: *O'Callaghan v. Bode*, 84 Cal. 498, 24 Pac. 269.

Papers on file in the proceedings for the settlement of an estate cannot be considered as evidence, unless offered in evidence upon the hearing of a petition to remove the administrator; and the mere commenting on them in argument is not sufficient to entitle the party to have them considered as evidence: *Estate of Moore*, 83 Cal. 583, 23 Pac. 794.

#### **Relevancy Must Appear.**

Where isolated questions are asked by counsel for the defendant, which are apparently irrelevant, immaterial, and aimless, and no purpose of the evidence is disclosed, it is not error to exclude the questions, although a relevant purpose might have been stated: *People v. Shaw*, 111 Cal. 171, 43 Pac. 593.

Where an offer of evidence is too general, vague and indefinite to give the court light upon the issue under consideration, it is not error to refuse the offer: *Havens v. Donahue*, 111 Cal. 297, 43 Pac. 962.

Where a question is asked, the answer to which would apparently not be material, counsel should state the fact expected to be proven, and make an offer to prove it by the witness: *Taylor v. Kelley*, 103 Cal. 178, 37 Pac. 216.

#### **Questions Assuming Fact in Dispute.**

An objection was sustained to the question (addressed to the defendant), "I will ask you, if with the money you paid, and five hundred dollars damages, whether the whole amount of the contract work and the extra work was paid." Held, that the question assumed five hundred dollars damages, a matter in dispute: *Barilari v. Ferrea*, 59 Cal. 1.

**Argumentative Questions.**

A question put to a witness, who had testified to an act done upon a specified date, without knowing on what day of the week it had occurred, as to how the witness could recollect a date so long ago, and could not remember the day of the week, was properly excluded, as being merely matter of argument for the jury: *People v. Harlan*, 133 Cal. 16, 65 Pac. 9.

**Form of Objection to Evidence.**

Where no objection is made to the introduction of a telegram as evidence, on the ground that no proof is made that it was delivered to the telegraph company for delivery or that it was prepaid, and no attempt is made to show the facts in the case, on cross-examination of the witness, objections cannot afterward be urged upon these grounds: *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

Where a specific objection to evidence is not needed to expose a latent vice lurking in the question, which is relied upon by the party objecting, and the question is objectionable from every standpoint, the general objections that the evidence asked for is irrelevant, immaterial and incompetent are sufficient: *Swan v. Thompson*, 124 Cal. 193, 56 Pac. 878.

The failure to specify an objection to admitted evidence, which might have been obviated if specified, is waived by failure to specify such objection with particularity; and where proffered evidence admitted is imperfect by the lack of preliminary proof, which may or may not be supplied, the objector must specify that objection, and a general objection to the evidence is not sufficient to warrant an investigation on appeals as to the insufficiency of the preliminary proof: *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453.

**Motion to Strike Out—Failure to Object.**

A motion cannot be entertained to strike out evidence which was responsive, to a question not objected to: *People v. Harlan*, 133 Cal. 16, 65 Pac. 9.

**Effect of Admission of Incompetent Testimony.**

If incompetent testimony is admitted without objection, the court will treat the testimony as competent on motion for nonsuit and on motion for a new trial: *Janson v. Brooks*, 29 Cal. 214.

**Striking Out Nonresponsive Answer.**

The rule that where no objection is made to an interrogatory a motion to strike out the answer will be denied, does not apply where the answer of the witness sought to be stricken out is not responsive to the question addressed to him: *People v. Dixon*, 94 Cal. 255, 29 Pac. 504.

**Error in Admitting or Rejecting, When Immaterial and How Cured.**

The admission of improper evidence, under objection which tends in any degree to affect the final conclusion of the court, is ground for reversal of the judgment upon appeal, and for ordering a new trial, notwithstanding that there may be sufficient other evidence in the record to support the findings of fact: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

Rulings against the admissibility of evidence are harmless, where the same facts are subsequently proved and included in the findings: *Commercial Bank of Madera v. Redfield*, 122 Cal. 405, 55 Pac. 160.

Any error committed in the sustaining of an objection to questions asked of a witness is cured, where the witness was subsequently recalled, and, without objection, testified fully in regard to the matter: *People v. Ross*, 113 Cal. 233, 46 Pac. 1059.

The admission of irrelevant and immaterial evidence is harmless, and not ground for reversal upon appeal, if the appellant could not have been prejudiced by it; and the result would have been the same if it had been excluded: *Davis v. Green*, 122 Cal. 364, 55 Pac. 9.

The reception of immaterial evidence for the respondent, whose case was fully made out without such evidence, if erroneous, is not prejudicial to the appellant: *Dauphiny & Co. v. Red Poll Creamery Co.*, 123 Cal. 548, 56 Pac. 451.



Error in the admission of evidence upon other matters not involving the question of mistake of fact upon which the judgment for plaintiff proceeds is without injury: *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630.

The exclusion of collateral correspondence offered to show the relations between the defendant and the one who claims to be his agent, is harmless, where it is merely a repetition of the oral testimony on that point: *Buckley v. Silverberg*, 113 Cal. 673, 45 Pac. 804.

It was not erroneous to sustain an objection to a question which was a mere repetition of one which had already been asked and answered: *Spitler v. Kaeding*, 133 Cal. 500, 65 Pac. 1040.

The exclusion of evidence offered by the defendant to prove that the deceased told him to sell the property in controversy is harmless, where testimony to that effect had already been given and was not stricken out: *Harp v. Harp*, 136 Cal. 421, 69 Pac. 28.

**Instrument May be Admitted Upon Proof of Due Execution Unless It Appears on Its Face that It Does not Include the Premises in Controversy.**

A deed to defendant admitted as prima facie evidence, the question as to the identity and description of the premises being matter of subsequent proof: *McCartney v. Fitz Henry*, 16 Cal. 184.

Deed under which party claims title is admissible, unless it is void on its face, or it appears therefrom that it does not relate to the lands in controversy: *Yates v. Smith*, 40 Cal. 662.

If deed of tract of land contains clause excepting from its operation such portions of the tract as had previously been conveyed by the grantor, the grantee, in ejectment to recover a parcel of the tract, may introduce it in evidence, without previously proving that the premises in controversy had not been conveyed by the grantor when the deed was given: *Hagar v. Spear*, 48 Cal. 406.

Objection to reception of deed, that grantor had conveyed to another person his interest in the property granted before the execution of the deed in ques-

tion, is not tenable. Such objection goes to its effect after it has been received in evidence, and not to its reception: *Peck v. Vandenberg*, 30 Cal. 11.

It is not a good objection to the introduction of a deed in evidence that it is not shown to include the premises in controversy. The calls of the deed are to be located after it is received in evidence. If it appears on the face of the deed that it does not include the premises in controversy, it may be objected to on that ground: *Cutter v. Caruthers*, 48 Cal. 178.

It is not necessary that a deed should be admitted in evidence in order that the court should construe it. It is the duty of the court to examine it sufficiently to determine upon its admissibility, and if inadmissible, to sustain an objection to its introduction in evidence, whether the action is tried with or without a jury: *Rogers v. Borchard*, 82 Cal. 347, 22 Pac. 907.

A power of attorney to sell "lots unsold" is admissible in evidence without first making proof that the lot in controversy was unsold when the power was given: *Gardiner v. Schmaezle*, 47 Cal. 588.

#### **Leading Questions, Discretion of Court.**

On the direct examination of a witness, leading questions may be allowed by the court in the exercise of a sound discretion, and the action of the court in that respect can only be reviewed so far as to determine whether its discretion has been abused. No abuse of discretion appearing a new trial cannot be granted on the ground that the court erred in allowing such questions: *Moran v. Abbey*, 63 Cal. 56, 58, *People v. Clary*, 72 Cal. 59, 60.

#### **§ 2045. Direct and Cross-examination Defined.**

The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must

be completed before the cross-examination begins, unless the court otherwise direct.

*Cross-references:*

Order of proof is in discretion of the court, section 2044; leading questions not allowed on direct examination, section 2046; rules of cross-examination, section 2048; re-examination of witness, section 2050.

**§ 2046. Leading Question.**

A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

*Cross-references:*

Leading questions permitted on cross-examination, section 2048; direct examination defined, section 2045; court to control mode of interrogation, section 2044.

See Jones on Evidence, sections 815-819.

Leading questions—General rule, section 815.

Same—Cases illustrating the rule, section 816.

Exceptions to the rule—Hostile witnesses—Introductory questions, section 817.

Same—As to facts not remembered—For purposes of contradiction, section 818.

Leading questions—Discretion of the court, section 819.

**What are Leading Questions.**

A witness for the prosecution was asked whom he saw watching around the place of the homicide. Held that the question was not leading: *People v. De Witt*, 68 Cal. 584, 10 Pac. 212.

See Jones on Evidence, sections 877-886.

Use of memoranda to refresh the memory of witnesses, section 877.

Same—When allowed, section 878.

Nonproduction of memorandum—Cross-examination, section 879.

Memoranda not made by witness, section 880.

Copy use to refresh memory, section 881.

Must the memorandum be contemporaneous with the fact recorded, section 882.

Mode of using memoranda, section 883.

Use of memoranda when the witness has no independent recollection of facts, section 884.

Further illustrations and decisions, section 885.

Other modes of refreshing memory—Use of memoranda as evidence, section 886.

Non production of memorandum—Cross-examination, section 879.

### **Refreshing Memory.**

Where a witness for the prosecution testifies at the trial, upon his direct examination, in variance with the testimony given by the same witness at the preliminary examination, it is proper to allow the district attorney to refresh the memory of the witness by reading the testimony given by him on the same subject at the preliminary examination, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury; and the prosecution is not bound in such case to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies: *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

In an action against the stockholders of a banking corporation, to enforce their individual and personal liability for unpaid deposits, a depositor, testifying to the balance of account as a witness, may refresh his memory from the pass-book as to deposits made and amounts drawn out, where it appears that the entries of deposits were made in the presence of the witness and under his direction, and that the entries of the amounts drawn out were made under his direction, and that he knew at the time that the balance

stated was correct: *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

Plaintiff put in evidence certain deeds, through which he claimed to have deraigned title to the demanded premises. Afterward, in the progress of the trial, the defendant's attorney, whilst engaged in the cross-examination of a witness for the plaintiff, desired to inspect the deeds already in evidence, but which were in the custody of the plaintiff's attorney, and who refused to submit them to the inspection of the defendant's attorney. On this refusal, the defendant's attorney moved the court to compel the plaintiff's attorney to produce the deed for inspection, and on his refusal to produce them, to strike them out as evidence. The motion was denied, and the ruling of the court was held error: *Pope v. Dalton*, 40 Cal. 638.

Inventory and appraisement of an estate admissible to refresh the memory of an appraiser thereof: *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

Reporter may read from notes of testimony taken by way of deposition of a party before the trial, which attempted deposition was unsigned: *Burbank v. Dennis*, 101 Cal. 90, 104, 35 Pac. 444.

A shorthand reporter who is called to testify as to what a witness on a former trial had then sworn to may refresh his memory by reading the shorthand notes of the testimony of the witness taken by him on the trial: *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811.

Witness cannot refresh his memory from affidavit previously sworn to and subscribed by him *ex parte*, unless it be shown that the affidavit was written by him or under his direction, at the time the facts occurred or immediately thereafter, or at some other time when the facts were fresh in his memory, and that he knew the same were correctly stated in the affidavit: *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799.

A witness called by the prosecution in a criminal case to prove statements made by the defendant may refresh his memory from written memoranda made by him at the time of the statements: *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649.

A witness called by the prosecution in a criminal case to prove statements made by the defendant may, while on the stand, refresh his memory by a reference to a written memorandum made by him at the time or soon after: *People v. Cotta*, 49 Cal. 166.

A witness may refresh his memory by reference to a memorandum, although it was not made by him or at the time the occurrences took place, if made under his direction at any time when the fact was fresh in his memory: *Paige v. Carter*, 64 Cal. 489, 2 Pac. 260.

A bookkeeper, as a witness, has a right to refer to the books kept by him, to refresh his memory: *Treadwell v. Wells*, 4 Cal. 260.

A nurse's record of the events transpiring at the sickbed of the decedent while she was present may be consulted to refresh her memory as a witness, but cannot be admitted in evidence independently: *In re Flint*, 100 Cal. 391, 34 Pac. 863.

A witness cannot testify from books of account in regard to sales which he did not make in person; however, if the account-book is before the jury, error in allowing the testimony to go in could not have injured the case, and would not warrant a reversal: *Carroll v. Storck*, 57 Cal. 366.

### **Reporter, and His Notes Taken at Trial.**

The stenographer who took the testimony given before the grand jury may testify as to the testimony then given by the defendant, and may read from the notes taken thereof, by way of refreshing recollection of the testimony: *People v. Sexton*, 132 Cal. 37, 39.

Where the official stenographic reporter of the court in which the trial was had wherein the alleged perjury was committed was sworn as a witness upon the trial of the defendant for perjury, and testified that he had taken notes of the testimony in the former trial, and that they were correct, it was not error for the trial court to allow him to read the testimony from his notes, subject to cross-examination: *People v. Lem You*, 97 Cal. 224, 227.

**Notes not Admissible without Witness.**

A reporter's copy of the testimony given by the testator in an action for divorce is not admissible upon the contest of the probate of his will. Its admissibility is not justified by section 275 of the Code of Civil Procedure. If the declarations of the testator made in the divorce suit were for any reason competent and admissible, they must be proved as declarations, by oral testimony of the reporter who heard them, who could refresh his memory from his notes taken at the time: *Estate of Benton*, 131 Cal. 472, 480.

Under section 275 of the Code of Civil Procedure, the stenographer's transcript of the testimony, in a civil case, given by a party in a prior action, although certified to by the stenographer as being correct, is not admissible in a subsequent action as evidence of what he said on the former trial: *Reid v. Reid*, 73 Cal. 206, 209.

When the title of the plaintiff is deraigned through the estate of a decedent, and it appears that the land sold to plaintiff was undervalued, on account of the adverse possession of a part of the land by the defendant, the inventory and appraisement of the estate, though admissible as memoranda to refresh the memory of an appraiser in whose handwriting the inventory was made, and who testified for the defendant to the fact of such undervaluation, are not admissible or competent evidence on behalf of the defendant to prove the facts stated in the inventory: *Baum v. Reay*, 96 Cal. 462, 463.

**Criminal Law, Right of Confrontation.**

A defendant in a criminal prosecution has the right to be confronted with the witness against him in the presence of the court, with the single exception that the deposition of a witness properly taken at a preliminary examination may be read upon its being satisfactorily shown to the court at the time of trial that he is dead, or insane, or cannot, after due diligence, be found within the state; and it is error to admit in evidence the testimony of a stenographer as to the evidence given by a witness upon the pre-



liminary examination, after the rejection of the deposition of such witness by reason of a defective certificate, although it was proved that such witness could not be found in the state, due diligence being used: *People v. Gardner*, 98 Cal. 127, 132.

### § 2048. Cross-examination.

The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.

#### *Cross-references:*

Court to control manner of interrogation, section 2044; cross-examination defined, section 2045; leading questions not allowed on direct examination, section 2046; direct examination, section 2046; direct examination must be completed before cross-examination begins, section 2045; leading questions defined, section 2046.

See *Jones on Evidence*, section 824—Leading questions may be asked—As to new matter.

#### **Right to Cross-examine.**

One party cannot be rightfully precluded from cross-examining the witness of a hostile party as to a certain subject matter, upon the ground that a different hostile party had previously examined him as to that matter; but where there are numerous parties, the court may, in its discretion, prevent frequent and apparently useless repetitions of the same identical questions by different parties: *Estate of Kason*, 127 Cal. 496, 59 Pac. 950.

The fact that, in a criminal trial, after the prosecutor had left the witness stand, another witness called by the prosecution testified as to certain cir-



circumstances, and in his relation of them differs from the account given by the prosecutor when on the stand, does not give the defendant a right further to cross-examine the prosecutor. Perhaps the court should permit a recall for further cross-examination, where counsel state that it shall have reference solely to new matter; but such cross-examination will be stayed when it appears that it is addressed to matter already inquired into: *People v. Parton*, 49 Cal. 632.

#### **Latitude Should be Allowed in Cross-examination.**

The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute: *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80.

Great latitude should be allowed, upon the cross-examination of witnesses, for the purpose of testing the knowledge, judgment, or bias of the witness; and the discretion of the trial court in allowing questions to be put upon cross-examination should not be impugned except for abuse: *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *Wixom v. Goodcell*, 90 Cal. 622, 27 Pac. 419; *McFadden v. Santa Ana Ry. Co.*, 87 Cal. 464, 25 Pac. 681; *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480.

Cross-examination of party or of expert should be allowed a liberal range, touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility or means of knowledge of the witness: *McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 464, 25 Pac. 681.

Great liberality should be allowed in the cross-examination of a witness, for the purpose of testing his accuracy or credibility; and where questions asked appear to relate to facts and circumstances within the general scope of the direct examination, it is error to exclude them: *People v. Westlake*, 124 Cal. 452, 57 Pac. 465.

It is competent to ask any questions on cross-examination of a witness which have a bearing directly or indirectly upon any portion of his testimony in chief, or which test the credibility, knowledge or rec-

ollection of the witness with reference thereto; and it is error for which a new trial may be granted to refuse to allow such questions: *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846.

Where plaintiff in testifying admits that he received the note he is suing on after maturity and under circumstances of suspicion, and defendant pleads payment of the note, great latitude should be allowed the defendant in cross-examining him as to all the circumstances and collateral facts throwing light on the act of payment, and as to the relations of the parties: *Moran v. Abbey*, 58 Cal. 163, 167.

But it ought to be allowed a free range within the subject matter of the direct examination. The witness may be sifted as to every fact touching the matter as to which he testifies, so that his temper, bearings, relation to the parties and the cause; his intelligence, the accuracy of his memory, his disposition to tell the truth; his means of knowledge, his general and particular acquaintance with the subject matter—may be fully tested: *Harper v. Lamping*, 33 Cal. 647.

#### **Court May Limit Cross-examination.**

The court may limit the cross-examination of a witness within proper bounds: *People v. Mooney*, 132 Cal. 13, 33 Pac. 1070.

It is proper for the trial court to place reasonable limits upon the cross-examination of a witness: *People v. Harlin*, 133 Cal. 16, 65 Pac. 9.

In a prosecution for murder, it is the right and duty of the court to limit the defendant's cross-examination of the medical witness who attended the deceased, after being shot, up to the time of his death, where such cross-examination was long continued upon immaterial and irrelevant matters of inquiry and ran into mere repetition of questions already asked: *People v. Rader*, 136 Cal. 253, 68 Pac. 707.

It is in the discretion of the court to confine a cross-examination of a witness within reasonable limits; and when protracted to an unreasonable extent, the court may prohibit its continuance: *Reed v. Clark*, 47 Cal. 194.

When both sides of a case are founded upon the same or cognate facts, the cross-examination must be left to the discretion of the judge, and his ruling cannot be regarded as erroneous: *Thornton v. Hook*, 36 Cal. 223.

The extent to which the cross-examination of a witness shall be carried is, in some degree, a matter of discretion in the trial court; and its rulings will not be disturbed upon appeal if no abuse of discretion appears: *Grimbley v. Harrold*, 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558.

It is not prejudicial error for the court to disallow questions asked of a witness upon a third cross-examination, which were merely in repetition of questions previously asked of the witness, and answered by him: *Casey v. Leggett*, 125 Cal. 664, 58 Pac. 264.

It is not error for the court to limit the cross-examination of a witness for the prosecution to matters testified to by him in chief: *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833.

It is the right and duty of the court to expedite business by curtailing cross-examinations upon immaterial and irrelevant matters of inquiry, and it is not error for the trial judge to interfere to prevent an answer to a question in whose name the title to property stands, the title to which is not even collaterally or remotely involved in the case, and which answer, if given, the defendant could not impeach, even if it were false: *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

When a party whose deposition was taken before the trial becomes a witness at the trial, it is an objectionable mode of cross-examination to read to the witness several questions and answers from the deposition, and ask if each of such answers was correct or true or what was said when the deposition was taken. The court has the power to stop the continuance of such examination as a useless consumption of time. The opposite party may show any contradictory statements for the purpose of impeachment by offering in evidence the deposition, or any part thereof, as an admission of the party, without first calling the at-

tention of the witness to inconsistent statements; and if the deposition is afterward placed in evidence, any error of the court in stopping the cross-examination would be rendered harmless: *White v. White*, 82 Cal. 427, 23 Pac. 276.

The scope within which cross-examination is to be confined, and the time requisite therefor, are, subject to certain well-defined rules, largely within the discretion of the trial court; and, where a witness has been exhaustively cross-examined upon a particular point, it is not an abuse of discretion for the court to excuse him from further cross-examination, in the absence of any suggestion from the counsel conducting the examination that he wished to cross-examine the witness upon other points: *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493.

#### **Error in Limiting Cross-examination, How Cured.**

The refusal to allow a defendant against whom judgment is rendered to cross-examine a witness for the plaintiff on a material matter is not a prejudicial error if the matter is afterward fully established by the testimony of the defendant: *San Joaquin Valley Bank v. Bours*, 73 Cal. 200, 14 Pac. 673.

#### **Cross-examination Must be Confined to Matters Inquired into on Direct Examination.**

The cross-examination of a witness should be confined to matters which have been elicited from him on his direct examination: *People v. Miller*, 33 Cal. 99.

Cross-examination cannot go beyond the subject matter of the evidence in chief, but should be allowed a very free range within it: *Jackson v. Feather River Water Co.*, 14 Cal. 18.

Questions responsive to matters testified to in the direct examination of a witness should be allowed, for the purpose of testing the value of his testimony upon the subject in relation to which he testified in his examination in chief: *Wixom v. Goodcell*, 90 Cal. 622, 27 Pac. 419.

Where a witness has not given any testimony on his examination in chief, with respect to the consid-

eration of the note, it is not proper cross-examination to ask him questions for the purpose of showing that the note was without consideration: *Brady v. Henry*, 77 Cal. 324, 19 Pac. 529.

A defendant in a criminal prosecution, who has become a witness in his own behalf, cannot be cross-examined as to any facts or matters not testified to by him on his examination in chief. If the trial court permit a more extensive cross-examination, the right secured to the defendant by section 13, article 1 of the constitution is violated: *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695.

It is improper to allow cross-examination of the defendant about any matter to which he has not testified in chief: *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

It is not error to exclude evidence offered on cross-examination of a witness for the prosecution, where it is not in explanation of anything called out on the direct examination, and is not proper cross-examination: *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453.

It is improper to cross-examine the defendant about any matters not testified to in his examination in chief; and to ask him questions as to his mode of life not testified to by him in chief, the obvious purpose and effect of which is to degrade and injure him in the estimation of the jury, is prejudicial error, and such error is not cured or the prejudicial effect removed by negative answers to the questions allowed, but the error lies in permitting such an examination to be made: *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12.

It is not always easy to determine precise point beyond which a cross-examination should not be allowed to proceed. The general rules are that a witness cannot be cross-examined except as to facts and circumstances connected with matters testified to by him on his direct examination: *Thornton v. Hook*, 36 Cal. 223.

It is prejudicial error to question the defendant on cross-examination as to the character of a detective employed by him, who was not called as a witness in the case: *Pyle v. Piercy*, 122 Cal. 383, 55 Pac. 141.

It is not error to exclude evidence offered on cross-examination of a witness for the prosecution, where it is not in explanation of anything called out on the direct examination, and is not proper cross-examination: *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453.

The defendant has no right to elicit evidence on cross-examination of witnesses for the people, where the questions asked do not refer to any matter testified to by such witnesses in chief for the prosecution; and where such witnesses were afterward called for the defendant, and testified fully as to the matter inquired about on cross-examination, the defendant could not be prejudiced by the refusal to allow the cross-examination, even if erroneous: *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495.

Where a defendant, accused of crime, testified only as to his present residence out of the county of the venue, he cannot be properly cross-examined as to his residence in the county at a time long prior to the date of the offense charged, and his answers to collateral and irrelevant questions about such prior residence are conclusive, and cannot be contradicted for the purpose of impeachment: *People v. Rodriguez*, 134 Cal. 140, 66 Pac. 174.

The cross-examination of a witness for the defendant who had made previous statements to the district attorney in conflict with the testimony given must be confined to the question of such conflict on material points; and it is error for the court to permit the district attorney to read portions of the statement made to him, having no relation to the testimony given, and to cross-examine the witness thereon, to the prejudice of the defendant: *People v. Cole*, 127 Cal. 545, 59 Pac. 984.

The defendant cannot put a hypothetical question on cross-examination of plaintiff's witness, addressed to him as an expert, in reference to the condition of the machine at the time when plaintiff was injured, when no inquiry relating thereto was made upon the direct examination: *Verdelli v. Gray's Harbor C. C.*, 115 Cal. 517, 47 Pac. 364.

But the cross-examination cannot be used to elicit answers which will constitute part of the plaintiff's case: *Gridley v. Boggs*, 62 Cal. 191.

Cross-examination must be responsive to the direct examination: *Thornburg v. Hand*, 7 Cal. 561.

**Cross-examination to Test Accuracy, Veracity, Credibility or Bias.**

A witness may be asked on his cross-examination any question which tends to test his accuracy, veracity or credibility, and the court should be especially liberal where the witness is a party to the suit: *Neal v. Neal*, 58 Cal. 287.

When a cross-examination is proper as testing the accuracy of the recollection or knowledge of a witness, it is competent to contradict him by rebutting evidence: *Davis v. California Powder Works*, 84 Cal. 617, 24 Pac. 387.

Where a witness testified upon the trial of a defendant for perjury, alleged to have been committed during a murder trial, that he was present and saw the deceased shot, that he was not a witness upon the first trial of the person charged with the murder, and had told no one what he knew about the shooting until he was picked up on the street during the second trial of such person, and taken to the district attorney's office, it is error for the court to refuse to allow the defendant to ask the witness, on cross-examination, who took him to the district attorney's office, for the purpose of showing how he came at so late a time to tell what he knew about the case: *People v. Lem You*, 97 Cal. 224, 32 Pac. 11.

Bias of witness toward the party conducting the examination may be shown by cross-examination: *People v. Benson*, 52 Cal. 380; *People v. Worthington*, 105 Cal. 166, 38 Pac. 689; *People v. Anderson*, 105 Cal. 32, 38 Pac. 513. See, also, *People v. Wasson*, 65 Cal. 538, 4 Pac. 555; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 481; *People v. Thomson*, 92 Cal. 506, 28 Pac. 589.

The refusal to permit such cross-examination is error, unless it appear as a matter of law that the an-

swers of the witness to the questions asked could have no tendency to show bias on his part: *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859.

Where a witness testified favorably to the defendant, in his examination in chief, it is competent to ask on cross-examination, whether he had not made statements out of court tending to show his friendly feeling toward the defendant, and whether he had not expressed an intention to suppress facts within his knowledge that would injure defendant's case; and such statements may be proved to impeach the witness if he denies making them: *People v. Murray*, 85 Cal. 350, 24 Pac. 666.

On the trial, one of the plaintiffs, when testifying as a witness in his own behalf, was asked on cross-examination if he had not on a certain night gone with shotguns upon the premises in controversy, while the defendants were in the peaceable possession thereof and forcibly dispossessed them. The court disallowed the question. Held, that the question was not proper as tending to show that the witness was biased or entertained ill-will against the defendants, but that its rejection was without prejudice, as the witness had previously admitted entertaining ill-will toward one of the defendants: *Anderson v. Black*, 70 Cal. 226, 11 Pac. 700.

Where a witness has testified to matters material to the issues, the party against whom he has testified may, on cross-examination, show that the witness is hostile to or prejudiced against him, and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses; but this can only be done when the witness has testified to material matters: *Luhrs v. Kelly*, 67 Cal. 289, 7 Pac. 696.

Where the testimony of a witness for the prosecution, on cross-examination, discloses prejudice against the family of the defendant on account of what was heard about their character, the particular reason for the prejudice is immaterial, and a question as to what the character was which the witness speaks about may be ruled out without prejudicial error: *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.



To show the bias of a witness for the prosecution, it is legitimate, upon his cross-examination, to show that, while he has informed the prosecution of his knowledge, he has refused to give any information to the defendant: *People v. Shaw*, 111 Cal. 171, 43 Pac. 593.

For example of question irrelevant to showing the feeling of a witness, see *People v. Ryan*, 108 Cal. 581, 584, 41 Pac. 451; *Wetherbee v. Dunn*, 32 Cal. 108.

If a witness retain counsel in a case to which he is not a party, and in the result of which he has no interest, it is a fact going to the credibility of the witness. The party against whom the witness is produced is always entitled to inquire of the witness as to the fact, and if admitted, it goes to the jury for whatever it is worth; and such explanation of motives as the witness may give for his action goes with it: *People v. Blackwell*, 27 Cal. 68.

#### **What is Proper Cross-examination.**

Where the plaintiff in forcible entry and detainer is forcibly ousted by several persons, and the defendant claims that, although present, he took no part in the expulsion, he should be allowed to cross-examine witnesses who testified to seeing weapons, as to whose hands they were in: *Ross v. Roadhouse*, 36 Cal. 580.

The cross-examination may extend to matters included in the original complaint, notwithstanding an amended complaint has been filed: *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540.

Where the defendant upon examination in chief testified as to the stealing of money from his vest on the night of the fire, to raise an inference that the thief fired the house, it was competent to cross-examine him fully as to all the facts and circumstances attending the matter and to show by comparison of his former testimony that his hesitation as to the facts appearing therein by question and answer, and that he testified, with hesitation, and differently, at the first trial as to facts narrated by him at the last trial without hesitation. If his former hesitation

had not appeared from the record, and his examination in chief did not show his demeanor at the first trial, his demeanor thereat could not be proved by him upon his cross-examination: *People v. Bishop*, 134 Cal. 682, 66 Pac. 976.

Where the plaintiff in an action to replevy property taken from his custody under attachment against a third person who had pledged it to the plaintiff testified in chief that it did not belong to the attachment debtor and that he had other security for the money due to him from the attachment debtor, a question, upon cross-examination, whether such additional security was not in value twice or three times as much as the money loaned is not subject to the objection of immateriality: *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50.

When a defendant accused of grand larceny, committed by stealing a horse, testifies in his own behalf, and attempts to explain his possession of the horse as having been innocently purchased from another person named, he may be cross-examined as to his knowledge of the whereabouts of such person, and whether he had made any effort to procure his attendance to testify in corroboration of his statement. *People v. Cline*, 83 Cal. 374, 23 Pac. 391.

A witness having testified that he managed certain property as the agent of the plaintiff, his wife, the property having been attached at the suit of Newman, as the property of the witness, was asked on cross-examination: "What was the understanding between yourself and Newman relative to attaching these cattle just previous to the commencement of the attachment suit?" Held, that the question was legitimate cross-examination: *Steinburg v. Meany*, 53 Cal. 425.

If, on an indictment for assault with intent to commit murder by shooting at the prosecutor, a witness for the prosecution testifies that he was near and saw the defendant shoot at the prosecutor, he may be asked on cross-examination for the purpose of testing his credibility, whether he did not soon after ask the prosecutor whether the defendant had shot at him: *People v. Bullard*, 51 Cal. 551.

Where a witness had testified in chief for the defendant that he heard of the prosecuting witness being robbed on a certain date, he may be asked on cross-examination how he knew he was robbed at that time: *People v. Patterson*, 124 Cal. 102, 56 Pac. 882.

It is competent for the prosecution to show upon cross-examination of the defendant that his conduct was inconsistent with the statements made in his direct testimony: *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

When defendant, on cross-examination of plaintiff's witness, simply aims to disprove by the witness the very cause the witness himself has made, the rule of excluding such evidence until defendant opens has no application: *Jackson v. Feather River Water Co.*, 14 Cal. 18; *Aitken v. Mendenhall*, 25 Cal. 213; *People v. Strong*, 30 Cal. 159; *Wetherbee v. Dunn*, 32 Cal. 108.

Where a plaintiff sets up his right to property by virtue of a conveyance which was shown by the testimony of a witness to be a mortgage, held, that the defendant, on cross-examination, could show that the mortgage had been satisfied: *Chenery v. Palmer*, 5 Cal. 131.

Where some of defendant's witnesses testified to the rate of speed of the car, questions asked them, on cross-examination, as to the distance between the termini, and the schedule time for that run, were within the range of proper cross-examination: *Cook v. Los Angeles etc. Electric Ry. Co.*, 134 Cal. 279, 66 Pac. 306.

When a witness is asked on his examination in chief as to whether he had received a grant, for the purpose of strengthening his testimony as to having seen and being capable of recognizing papers pertaining to the Mexican grant in controversy, it is competent to cross-examine him as to whether the grant he had received was a Mexican grant: *Davis v. California Powder Works*, 84 Cal. 617, 24 Pac. 387.

It is competent upon cross-examination of the plaintiff, for the defendant to show that plaintiff, prior to the injury sustained, was familiar with the place

where it occurred, and knew of the obvious danger there exposed to view, and for that purpose to call the plaintiff's attention to a deposition given by him which was not put in evidence, and to question him upon the answer given therein: *McGraw v. Friend & Terry Lumber Co.*, 133 Cal. 589, 65 Pac. 1051.

**What is not Proper Cross-examination.**

The plaintiff's vendor having testified as a witness for the plaintiff to the execution of the bill of sale, the defendant, on cross-examination, proposed to ask him several questions as to the consideration of the instrument, which were objected to on the ground that they were not responsive to the examination in chief. Held, the objections were properly sustained: *McFadden v. Mitchell*, 61 Cal. 148.

Witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue: *People v. Jenkins*, 56 Cal. 4.

Party who has not yet opened his own case cannot do so by cross-examination of his adversary's witness: *Thornton v. Hook*, 36 Cal. 223.

Upon cross-examination of a witness, evidence of his relationship to the defendant as to other and independent transactions not involved in the case on trial was properly excluded: *People v. McLean*, 135 Cal. 306, 67 Pac. 770.

Where a witness testified in chief that a piece of land was assessed for taxes, it is not a cross-examination to ask him the usual way of selling property for taxes, or whether another lot of land was sold for taxes: *Wetherbee v. Dunn*, 32 Cal. 106.

The witness testified, in response to a question by the district attorney, that she had never been on the witness-stand but once before, and that then she was very much excited. The counsel for the defendant then asked her what she was called to testify for. Held, that the question was immaterial: *People v. De Witt*, 68 Cal. 584, 10 Pac. 212.

Where a witness testified that he had purchased the goods in question at sheriff's sale, and had afterward sold them to the plaintiff, a question on cross-examination assuming a contrary fact, that the goods

were handed over to her husband, was properly disallowed as unfair: *Hand v. Scodeletti*, 128 Cal. 674, 61 Pac. 373.

The supreme court upheld a ruling in the court below, excluding a question on the ground that it had already been fully answered and no good could result from a repetition of the previous testimony: *Brumagim v. Bradshaw*, 39 Cal. 38.

A defendant cannot be cross-examined as to other matters for the purpose of discrediting him by an attack upon his character, which does not concern the matter about which he has testified: *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

The defendant is not entitled to offer proof of affirmative matter set up in his answer, until plaintiffs have made their case and submitted it to the court; and proof of the execution of an agreement relied upon in defense to a note in suit is not proper in cross-examination of the plaintiffs, and its admission in evidence upon such cross-examination is error: *Haines v. Snedigar*, 110 Cal. 18, 42 Pac. 462.

Where, upon cross-examination of the prosecuting witness, a paper was presented to the witness by defendant's counsel, who asked him to identify two items in it, but did not offer the paper or the items in evidence, it is erroneous to allow the prosecution on re-examination to offer the paper in evidence in explanation of the two items, against the objection of the defendant: *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

#### **Cross-examination of Defendant in Criminal Cases.**

Where the defendant was indicted for grand larceny committed by stealing money from Ernest Allen, and on the trial became a witness in her own behalf, and on cross-examination was asked by the attorney for the people if she had not been arrested for stealing money from one Senter, her attorney objected to the question, the supreme court said that had an objection as to the admissibility of the evidence within the rules governing the cross-examination of

witness been presented below, the question might have been withdrawn, or, if insisted on, then the court below would have been called upon to consider its admissibility in that view, and in so doing would have been in the exercise of its measurable discretion: *People v. McCauley*, 45 Cal. 147, 148.

A defendant who becomes a witness in his own behalf, and undertakes, in his direct examination, to state all that transpired between two points of time, may be asked on his cross-examination if he has omitted anything pertinent to the case; and his attention may be directed to the precise point, by asking him if some specified thing did not occur: *People v. Russell*, 46 Cal. 121.

A defendant accused of crime in this state has a constitutional right to be protected from forced examination as to any matters concerning which he has not voluntarily testified in his own behalf; and no evidence can be wrung from him: *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

A defendant does not waive his constitutional right to protection by taking the stand as a witness; nor can he bind himself in advance to waive it. He may claim his right when the occasion arises: *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

A defendant offering himself as a witness may be cross-examined as to occurrences testified to in his examination in chief, where the cross-examination does not go beyond the limitations prescribed in section 1323 of the Penal Code, as construed by the decisions of this court: *People v. Holmes*, 118 Cal. 444, 50 Pac. 675.

A defendant testifying in his own behalf is put upon the same plane with other witnesses, so far as relates to calling out upon cross-examination any fact which the jury may deem inconsistent with his direct testimony, and where he has testified in chief that he had won the forged check in a game of poker, he may be asked on cross-examination whether he stated how he came into possession of the check to the arresting officer, or to the officers in whose custody he was placed, or to the person who informed

him of the particulars of the charge against him: *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

Upon cross-examination of the defendant as a witness in his own behalf, it is not competent to introduce, for the purpose of impeachment, evidence showing that he committed willful perjury at the coroner's inquest, upon a matter concerning which he had not testified in chief: *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

People are entitled to cross-examine the defendant respecting an occurrence about which he had testified to in chief, in order to lay a foundation to impeach his credibility: *People v. Dennis*, 39 Cal. 625.

The fact that a defendant offered himself as a witness in his own behalf does not change or modify the rules of practice with reference to the proper limits of a cross-examination, and does not make him a witness for the state against himself: *People v. McGungill*, 41 Cal. 429.

#### **Impeachment.**

In a prosecution for murder, a witness for the defense who testifies on his direct examination to certain facts tending to show that the deceased on the day of the homicide sought to bring about a encounter between the defendant and himself, may be cross-examined as to former statements made by him relative to the matter, inconsistent with his direct testimony, and as to any matter connected with it tending to show the mental condition of the deceased toward the defendant: *People v. French*, 69 Cal. 169, 172.

#### **Whole Conversation Rule, must be Relevant.**

The rule that upon cross-examination the whole of a conversation may be brought out in regard to which there has been any evidence in chief does not authorize a party whose witness is testifying in chief to ask the witness to state the whole of a conversation, which may involve a mass of matter not relevant; and a refusal of the court to permit such state-

ment is not prejudicial, as the party has the right to call the attention of the witness to any further relevant declarations: *Vance v. Richardson*, 110 Cal 414, 418.

**§ 2049. Party Producing Witness not Allowed to Impeach Him.**

The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 2052.

*Cross-references:*

Adverse party may impeach, section 2051; impeaching witness by proof of prior inconsistent statements, section 2052; evidence of good character not admissible until character impeached, section 2053; evidence of facts which serve to show credibility of witness may be given on the trial, section 1870, subdivision 16; credibility of witness is question for the jury, section 1847; and they are to be so instructed, section 2061; evidence of particular wrongful acts, section 2051; presumption that witness speaks the truth, section 1847.

See *Jones on Evidence*, sections 857-859.

A party cannot impeach his own witness, sections 857, 858.

Exceptions and qualifications of the rule, section 859.

**Party May not Impeach Character of His Own Witness.**

Where an agent for the plaintiffs had testified fully for the plaintiffs, and was afterward called as a witness for the defendant, the defendant is not entitled upon an unfavorable answer from the witness, to impeach his general reputation for truth, honesty .



and integrity, if objection thereto were properly raised by a mere general objection that the evidence is "incompetent, irrelevant, and immaterial," it being competent in a general sense and only incompetent because of the fact that defendant had made the impeached witness his own, which must be specified in order that the point of the exception may be apparent to the court: *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

Upon the trial of a defendant accused of felony, where the prosecution introduced the testimony of a witness taken upon the preliminary examination, and the defendant, for the purpose of contradicting the witness, introduced his evidence taken upon a previous trial, the witness did not thereby become the witness for the defendant, within the rule that a party cannot impeach his own witness, and it was error for the court to refuse to allow the defendant further to impeach the witness by evidence of his bad character: *People v. McFarlane*, 134 Cal. 618, 66 Pac. 865.

#### **Party is Bound by Testimony of His Own Witness.**

If a party offers a witness to prove the sale of a mining claim under which he claims, and the witness says the sale was in writing, the party is bound by the statement of the witness, and must produce the writing or account for its loss: *Patterson v. Keystone, Min. Co.*, 30 Cal. 360.

A party calling out a fact from a witness indorses his credibility, and is concluded by his statement: *People v. Anderson*, 26 Cal. 129.

#### **Party May Impeach His Own Witness by Evidence of Contradictory Statements.**

Parties may be permitted to impeach their own witnesses by proof of counter-statements when they are honestly surprised at adverse testimony given by them: *People v. Johnson*, 131 Cal. 511, 63 Pac. 842.

The defendant cannot impeach a witness called by himself, by proof of contradictory statements made by him, unless the testimony of the witness is preju-

dicial to his case: *People v. Conkling*, 111 Cal. 616, 44 Pac. 314.

Where part of libelous matter charged was that the complaining witness, who was a newspaper editor and proprietor, was paid by a dishonest and dishonorable cabal or confederation of Italians, known as "the Camorra," to libel and vilify certain people, and such complaining witness was called to the stand as a witness for the defendant, and asked with specifications of time, place and persons present, if he had not stated that he had instituted the prosecution of the defendant at the instance of others, to which he answered that he had not, the defendant cannot be permitted to impeach his own witness by proof that he had made such statement: *People v. Crespi*, 115 Cal. 50, 46 Pac. 863.

A witness, whichever party calls him, cannot be impeached unless he has given testimony against the impeaching party. The mere failure of a witness to testify to a fact as expected does not authorize the party calling him to prove that he had elsewhere made the desired statements. It is only when he has given damaging testimony that he can be impeached: *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106.

Where the prosecution was allowed, on the ground of surprise, to lay a foundation for the impeachment of its own witness by proving that he had made contradictory statements, an objection to such proof, on the ground that if he had made such contradictory statement the testimony should first be read to him, is properly overruled, it not appearing that the contradictory statement was in the shape of testimony: *People v. Kruger*, 100 Cal. 532, 35 Pac. 88.

The prosecution, under section 2049 of the Code of Civil Procedure, is allowed to impeach his own witness by proving statements inconsistent with his present testimony given on the trial: *People v. De Witt*, 68 Cal. 584, 586.

When a witness for the prosecution in a case of homicide testifies inconsistently with the testimony given by him at the coroner's inquest, it is proper to call his attention to what he had testified to before

the coroner, and upon his denial of such testimony, to prove by the coroner that he did so testify: *People v. Bushton*, 80 Cal. 160, 161.

#### **Contradiction of Witness by Proof of Inconsistent Statements.**

To impeach a witness upon the ground of inconsistent statements, the impeaching testimony must be plainly inconsistent with that already given: *Estate of O'Connor*, 118 Cal. 69, 50 Pac. 4.

The statements of a witness are not admissible for purposes of impeachment, if the inconsistency of the impeaching statements with the evidence of the witness does not appear by direct comparison therewith, but only inferentially, while another inference might be drawn in favor of their consistency: *People v. Cullum*, 122 Cal. 186, 54 Pac. 589.

#### **Party May Contradict His Own Witness.**

Party calling witness is not precluded from proving truth of any particular fact in direct contradiction to what the first witness may have testified: *Norwood v. Kenfield*, 30 Cal. 393.

### **§ 2050. Re-examining and Recalling Witnesses.**

A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

#### *Cross-references.*

Order of proof in general is in discretion of the court, section 2042; mode of examination is in dis-

cretion of the court, section 2044; witness must remain until the testimony is closed, section 2066; witness must be detained only so long as the interests of justice require, section 2066; writing cannot be read to jury unless witness is recalled, section 2054.

See Jones on Evidence, sections 847-876.

Re-examination—Object of, section 874.

Same, illustrations, sections 875, 876.

### **Re-examination is Subject to Discretion of the Court.**

There is no abuse of the discretion of the court in refusing to permit a witness, on re-examination, to be further interrogated on a point concerning which he has already fully testified: *Brumagim v. Bradshaw*, 39 Cal. 24.

### **Repeated Examination on Same Point.**

During the redirect examination of the prosecuting witness, he gave testimony of the same character and the same topic as in his direct and cross-examinations. The objection of the defendant ought to have been sustained, because the testimony was an unnecessary repetition, and the re-examination indicated a disposition on the part of the prosecution to emphasize the testimony of the witness upon a particular subject. Error, however, cannot be predicated upon the ruling. The matter is left to the discretion of the court: *People v. McNamara*, 94 Cal. 509, 512.

### **Permitting Recall of Witness is Discretionary.**

When a witness has been once called and examined by a party, it is within the discretionary power of the court to allow him to be recalled and further examined by the same party, even if the other party objects: *Tyler v. Healey*, 51 Cal. 191; *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540.

The matter of permitting a party who has cross-examined a witness to recall him in order to make a further cross-examination, rests greatly in the discretion of the court: *People v. Keith*, 50 Cal. 137.

Where the court refuses to permit the defendant to recall a witness who had already been on the stand

twice there was not an abuse of discretion: *People v. Moan*, 65 Cal. 532, 4 Pac. 545; *Rea v. Wood*, 105 Cal. 314, 38 Pac. 899.

When the defendant has called and examined a witness and rested, and the plaintiff has introduced rebutting testimony, it is an abuse of the discretion of the court to refuse to allow the defendant to re-examine the witness if his counsel state that the fact the witness would testify to certain material matters has come to their knowledge since the close of the defendant's case, and if the recalling of the witness will work no surprise on the plaintiff: *Barry v. Bennett*, 45 Cal. 80.

The court may, in its discretion, permit the plaintiff to recall one of the defendant's witnesses after his cross-examination has been finished, for a further cross-examination, to lay a foundation for discrediting or impeaching him: *Reed v. Clark*, 47 Cal. 194.

It is no error to refuse to allow a plaintiff to recall a witness in rebuttal for the sole purpose of contradicting a witness for the defendant on a point upon which plaintiff's witness has already testified: *Phelps v. McGloan*, 42 Cal. 298.

It is not an abuse of discretion for the court to refuse to allow a witness to be recalled after the case has been continued for argument: *Briswalter v. Palomares*, 66 Cal. 259, 5 Pac. 256.

If the ends of justice require, it is both the right and duty of the court to permit a witness to be recalled after a party has closed his case: *Fairchild v. California Stage Co.*, 13 Cal. 599.

If the counsel for the defendant, after the prosecution has rested, ask for leave to further cross-examine the prosecutor on new matter, the facts that the people have rested and that the defendant may recall the prosecutor as his own witness are not sufficient reasons for the court to deny the request: *People v. Parton*, 49 Cal. 632.

Where the complaint was amended after the submission of the cause, and the trial was then continued for further hearing of evidence, a motion to

strike out all further testimony given by the plaintiff in support of the amended complaint, as showing in contradiction of the affidavit for the amendment that the facts testified to were all previously known, is properly denied on account of the objection being too broad, where a portion of the testimony given tended to establish other and independent facts; and it was matter in the discretion of the court as to what further relevant testimony to allow: *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955.

### § 2051. Witness—How Impeached.

A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

#### *Cross-references:*

Presumption of innocence, sections 1847, 1963, subdivision 1; witness may be impeached by manner of testifying, character of testimony, by evidence of his character for truth, honesty or integrity, or his motives, or by contradictory evidence, section 1847; evidence of prior inconsistent statements, section 2052; party introducing witness not allowed to impeach his character, section 2046; *falsus in uno, falsus in omnibus*, section 2061, subdivision 3; showing good character after impeachment, section 2053; person who has been convicted of crime is competent as a witness, section 1879; witness must answer to fact of his previous conviction for felony, section 2065.

See Jones on Evidence, sections 847-865.

Impeachment of witnesses, section 847.

Impeachment by proof of former contradictory statements, section 848.

Same—Laying foundation, section 849.

Contradictory written statements—Mode of procedure, sections 850, 852.

Denial of statements not necessary to admit contradiction, section 852.

Impeachment—Expressions of opinion—Of hostility, section 853.

Ordinary rules do not apply in case of parties, section 854.

Right to impeach not a matter of discretion, section 855.

Impeachment—Witness may explain on re-examination, section 856.

A party cannot impeach his own witness, sections 857, 858.

Exceptions and qualifications of the rule, section 859.

Party not bound to accept testimony of his own witness as correct, sections 860, 861.

Reputation for veracity—Mode of impeachment, section 862.

Only general reputation for truth and veracity admissible, section 863.

The view that the inquiry may relate to moral character generally, section 864.

Inquiry as to believing the witness under oath, section 865.

### **General Reputation.**

In laying the foundation for the impeachment of the defendant, the prosecution asked a witness whether he was acquainted with the defendant's general reputation in the community where he lived "for truth, honesty or integrity." The defendant made no objection to the form of this question, but did object to the following question asked the witness as to what such reputation was. The court overruled the objection. Held, that as the court's attention had not been called to the technical defect in the form of the first question, in the use of the word "or" for "and," and as the defendant had ample opportunity on cross-examination to find out what qualities the witness was testifying about, the ruling was not erroneous: *People v. Ryan*, 108 Cal. 581, 41 Pac. 451.

**Evidence of Character or Reputation for Truth and Veracity.**

For the purpose of impeaching a witness, the inquiry is not confined to his reputation for truth and veracity, but may extend to his general reputation for truth, honesty and integrity: *Heath v. Scott*, 65 Cal. 548, 4 Pac. 557.

When it is sought to impeach a witness by attacking his reputation for truth, honesty and integrity, the inquiry and answer must be as to his general reputation: *People v. Markham*, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620.

Where a witness for the defense was asked, for the purpose of impeachment of the prosecuting witness, whether he knew his general reputation in the community where he lived for honesty, truth and veracity, and the witness answered that he only knew from what he heard people generally say of him, it is error for the court to rule that he could only testify as to what he knew of his reputation of his own personal knowledge: *People v. Webster*, 89 Cal. 572, 26 Pac. 1080.

A witness who is called to impeach another may answer that he would not believe such other witness on oath: *Stevens v. Irwin*, 12 Cal. 306.

It is not essential to the impeachment of a witness to prove by the witnesses called for that purpose that from his or her general bad reputation for truth and veracity they would not believe him or her under oath: *People v. Tyler*, 35 Cal. 553.

Testimony to impeach a witness should not be confined to his character for truth and veracity, but should extend to his entire moral character, and a witness may be impeached by testimony showing that his general moral character is bad: *People v. Yslas*, 27 Cal. 630.

Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness: *People v. Yslas*, 27 Cal. 630.

The testimony of witnesses called to prove the reputation of a witness, who testified from personal knowl-



edge only, was properly stricken out: *People v. Ward*, 134 Cal. 301, 66 Pac. 372.

One cannot be asked whether "from what you know" of the witness sought to be impeached he would believe him under oath, as this is testifying, not from reputation, but from one's knowledge: *People v. Methven*, 53 Cal. 68; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73. And see *People v. Webster*, 89 Cal. 572, 26 Pac. 1080.

Witness' good character is a fact to be determined by the jury from competent evidence: *People v. Velarde*, 59 Cal. 457.

A question as to the defendant's general reputation "for truth, honesty or integrity" may be technically defective, but under the circumstances of the case the defect was unimportant: *People v. Ryan*, 108 Cal. 582, 41 Pac. 451.

A witness who has testified to the general reputation of another witness as to truth, honesty, and integrity may be asked whether, on such reputation, he would believe him under oath; and the rule in this respect established in *Stevens v. Irwin*, 12 Cal. 306, has not been changed by the enactment of section 2051, of the Code of Civil Procedure: *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

A witness in a criminal case may be impeached by evidence of his general reputation for truth, honesty and integrity, and it is error to confine the question to his general reputation for truth and veracity; but such error is not prejudicial where the witness, upon the trial of a defendant charged with larceny in the stealing of cattle, gave direct evidence of his own dishonesty by testifying that he and the defendant had stolen the cattle: *People v. Silva*, 121 Cal. 668, 54 Pac. 146.

The fact that in questioning two out of seven impeaching witnesses, the term "general" was omitted in making the inquiry as to their knowledge of the defendant's reputation for truth, honesty and integrity, is not material where the whole manner of the inquiry, and the character of the question asked

evinced clearly that it was the general reputation of the impeached witness that was being sought; and where the defendant did not object specifically to the form of the question when put, he cannot be heard to urge such objection upon appeal for the first time: *People v. Hickman*, 113 Cal. 80, 45 Pac. 175.

Upon trial of a charge of larceny, it is proper to permit the prosecution to cross-examine witnesses called in behalf of the defendant to sustain his reputation in reference to his reputation for honesty and integrity; and they may be cross-examined with reference to specific acts for the purpose of overcoming the effect of their testimony upon direct examination: *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

There is no inflexible rule as to the form of the questions to be put to witnesses called to impeach the general reputation of a witness for truth, honesty and integrity, and objections going more to the form than the substance of such questions, if there is no such deviation from the general course to be followed, as marked out by the decision of this court, as to result in injustice to the defendant, are not ground of reversal: *People v. Roberts*, 122 Cal. 377, 55 Pac. 137.

### **Conviction of Felony.**

In order to impeach the credibility of a witness, including a defendant when he testifies, he may be asked if he was ever convicted of a felony, and the particular felony of which the defendant has been convicted may be named; but beyond this the examination should not go: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

A witness for the defendant cannot be impeached, upon cross-examination, by showing that he had been indicted and tried for the same offense, without seeking to show that he had been convicted of a felony: *People v. Warren*, 134 Cal. 202, 66 Pac. 212.

A witness may be impeached by showing that he has been convicted of a felony by the verdict of a jury, and the fact that no sentence had yet been pronounced upon the witness is immaterial, where the

verdict does not appear to have been set aside: *People v. Ward*, 134 Cal. 301, 66 Pac. 372.

Where a witness on cross-examination testified that he had once been tried and found guilty of perjury, before a jury, and it was subsequently proven that the conviction was reversed upon appeal, and the charge was thereafter dismissed, the refusal of the court to give an instruction that "a judgment of conviction which has been reversed is a mere nullity, and has no vitality for any purpose," is not good ground for granting a new trial, though such instruction might well have been given: *Davis v. McNear*, 101 Cal. 606, 36 Pac. 105.

The court below did not err in refusing to instruct the jury that "a witness who has been convicted of the crime of burglary, and served out a term of imprisonment for such crime, is not entitled as a witness to full credit at your hands": *People v. McLane*, 60 Cal. 412.

In criminal trials the defendant who testifies in his own behalf may be asked whether he has not been convicted of felony: *People v. Johnson*, 57 Cal. 571; *People v. Sears*, 119 Cal. 267, 51 Pac. 325.

He thereby waives the protection given to him by section 1093 of the Penal Code: *People v. Arnold*, 116 Cal. 682, 48 Pac. 803.

Previous conviction of a misdemeanor must be shown by the record: *People v. Schenick*, 65 Cal. 625, 4 Pac. 675.

But as to conviction of felony it is different: *People v. Schenick*, 65 Cal. 625, 4 Pac. 675; *People v. Johnson*, 57 Cal. 571; *People v. McLane*, 60 Cal. 412.

The party seeking to impeach a witness may ask him on cross-examination whether a judgment and sentence had been pronounced against him for a felony: *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481.

If the conviction of felony has been reversed upon appeal, it is proper for the judge to instruct the jury that such conviction is a nullity; but a refusal so to instruct is not good ground for granting a new trial: *Davis v. McNear*, 101 Cal. 606, 36 Pac. 105.

A defendant in a criminal action who offers himself as a witness may be asked on cross-examination, for the purpose of impeaching him, if he had not been previously convicted of a felony, and the fact that the information charges such previous conviction, which the defendant, by his plea, confesses, does not render the cross-examination improper: *People v. Crowley*, 100 Cal. 478, 482.

On the trial, the defendant, as a witness in his own behalf, testified that at the time of the alleged larceny he was under the influence of liquor, and that as he was walking along he fell over something, and the first thing he knew somebody grabbed him. This was all he testified to on his examination in chief. On cross-examination, after being asked as to his true name, he was asked whether or not he had gone by several other names, and whether he had ever been convicted of a felony. Held, that the cross-examination was proper: *People v. Meyer*, 75 Cal. 383, 388.

If the defendant proves that a witness, called and examined by the prosecution, has been convicted of a felony, it is an assault upon the character of the witness for integrity and truth, and the prosecution may, in rebuttal, examine witnesses to prove that the reputation of the witness for truth and integrity is good in the community where he resides: *People v. Manning*, 50 Cal. 233, 234.

### **Felony, Conviction, Introducing Record.**

A witness, on cross-examination, may be asked if he has not been convicted of a felony, and the party asking the question may also introduce the record of his conviction: *People v. Chin Mook Sow*, 51 Cal. 597, 600.

### **Misdemeanor, Conviction.**

A witness cannot be asked on cross-examination, for the purpose of affecting his credibility, whether he had been arrested and convicted of a misdemeanor, and had been incarcerated in the county jail. Under section 2051 of the Code of Civil Procedure, evidence

of such a character is limited to convictions for felonies: *People v. Carolan*, 71 Cal. 195, 196.

The record of a conviction of a misdemeanor is not admissible for the purpose of discrediting a witness, unless it is shown that the offense involved moral turpitude or infamy: *People v. Carolan*, 71 Cal. 195, 196.

### **Contradictory Statements.**

A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted, and if he attempts so to do, the court should stop the inquiry: *Evans v. De Lay*, 81 Cal. 103, 105.

Where the motorman testified that he could not tell whether the car came in contact with the deceased he may be impeached by the evidence of witnesses in regard to statements by him to the contrary, which he denied upon cross-examination and it is a question for the jury whether such statements were made by the witness, as testified by the impeaching witnesses: *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 492.

Where dying declarations of the deceased were admitted in evidence against the defendant without objection, and after the prosecution had closed the defendant offered to prove that on his examination before the committing magistrate the deceased had testified to facts directly contradicting his dying declarations, and also that he had made other and contradictory declarations, a refusal to allow the proof was held error: *People v. Lawrence*, 21 Cal. 371.

### **Other Methods of Impeachment.**

A witness cannot be impeached by independent evidence of another witness that he is a person of weak memory, and his memory can only be impeached by cross-examination, if he is not affected by mental derangement: *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, 45 Pac. 7.

### **Improper Impeaching Matters.**

Witness cannot be discredited by asking him if he had not been impeached as a witness upon the trial

of another action: *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

A witness cannot be impeached by evidence showing him to be a person without religious belief: *People v. Copsey*, 71 Cal. 548, 12 Pac. 721.

A witness cannot be asked on cross-examination, for the purpose of affecting his credibility, whether he had been arrested and convicted of a misdemeanor, and had been incarcerated in the county jail. Under this section evidence of such a character is limited to convictions for felonies: *People v. Carolan*, 71 Cal. 195, 12 Pac. 52; *People v. Silva*, 121 Cal. 668, 54 Pac. 146.

See, however, *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396 (when the defendant testifies in chief about his birth, parentage, education and business, he may be asked, on cross-examination, whether he had ever been arrested before).

A witness cannot be impeached by independent evidence of another witness that he is a person of weak memory: *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, 45 Pac. 7.

If married women testify as witnesses for the people in a criminal case, the defendant cannot, for purpose of affecting their credibility introduce testimony to prove a conspiracy on the part of their husbands to falsely prosecute him and obtain his property: *People v. Parton*, 49 Cal. 632.

### **Specific Immoral Acts.**

It is not proper to ask a witness, for the purpose of impeachment, whether he had been arrested, pleaded guilty, and paid a fine for beating, bruising and battering a woman of the town: *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

An objection to such question, on the ground that it did not tend to impeach the witness, and that the record was the best evidence, is specific enough to invoke the rule which does not permit a witness to be impeached by evidence of particular wrongful acts: *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

On a trial for murder, where the defendant has been called as a witness on his own behalf, a question as to whether or not he has been previously arrested for shooting at certain individuals cannot be allowed on cross-examination for the purpose of impeaching him under section 2051 of the Code of Civil Procedure; nor can he be asked as to his knowledge of the unlawful character of the business carried on at a house where he was employed as doorkeeper, and frequented by the deceased: *People v. Hamlin*, 68 Cal. 101, 8 Pac. 687.

A witness cannot be asked on cross-examination, for purposes of impeachment, whether she did not keep a house of prostitution in a place where she had lived: *Estate of Kasson*, 127 Cal. 496, 59 Pac. 950.

A witness cannot be impeached by evidence of specific wrongful acts for the purpose of showing that the witness is destitute of moral qualities; nor can the witness be questioned on cross-examination as to such acts: *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1.

Witness cannot be impeached by evidence that she had been guilty of bigamy: *Evans v. De Lay*, 81 Cal. 103, 22 Pac. 408.

A witness cannot be impeached on cross-examination by proof that the witness had been living with her husband before marriage, and cannot be questioned relative thereto on cross-examination, if no testimony was given in chief bearing on that subject: *Pyle v. Piercy*, 122 Cal. 383, 55 Pac. 141.

Specific acts of immorality cannot be shown to impeach a witness; and where evidence thereof does not tend to shed light upon the issues tried, and is calculated to besmirch the character of material witnesses, and to weaken their credibility, its admission is prejudicial error: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

Where a mother and daughter were sole witnesses to the marriage of the daughter with a deceased person, they cannot be impeached by evidence of a highly immoral book shown to have been written by the mother and read by the daughter, and to have been

suppressed by the Society for the Suppression of Vice; nor is evidence admissible to show immoral conduct on the part of the alleged wife with other men prior to the alleged marriage: *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008.

To ask the defendant on cross-examination, while a witness in his own behalf, whether at the time of the homicide he was living with a woman who was not his wife is prejudicially objectionable. Such objection is cured, however, if the defendant's own witnesses testify to the same effect: *People v. Clarke*, 130 Cal. 642, 63 Pac. 138.

It is not proper to ask a witness for the prosecution on cross-examination whether he is connected with a gambling-house, when such evidence has no relevancy to anything called out on his direct examination, and is asked solely for the purpose of discrediting the witness with the jury: *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12.

A witness who testified that she was the wife of the deceased, and testified generally as to her manner of life and habits, cannot be collaterally impeached by the defense by testimony that she had been an inmate of a house of prostitution: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

Upon the trial of a defendant accused of burning insured property, if the keeper of the house of ill-fame has testified to certain damaging statements made by defendant at her house both before and after the fire, and the defendant, when called as a witness in his own behalf, denied the statements, while admitting that he may have been at such house at the dates testified to, he cannot be asked on cross-examination, for the purpose of discrediting him and degrading his character whether he did not remain all night at that house upon a certain date, some six months after the fire: *People v. Tiley*, 84 Cal. 651, 24 Pac. 290.

Questions asked upon cross-examination of the wife of the defendant, for the avowed purpose of impeachment, as to whether she did not live by prostitution, and as to particular times and places, and particular men and special modes of solicitation for



immoral purposes, are highly improper; and the asking of them is prejudicial error as insinuating damaging charges against the witness tending to disgrace and degrade her: *People v. Crandall*, 125 Cal. 129, 134.

### **Particular Wrongful Acts.**

On the trial, one of the plaintiffs, when testifying as a witness in his own behalf, was asked on cross-examination if he had not on a certain night gone with shotguns upon the premises in controversy, while the defendants were in the peaceable possession thereof, and forcibly dispossessed them. The court disallowed the question. Held, that the question was proper as tending to show that the witness was biased or entertained ill-will against the defendants. It was not an attempt to impeach by evidence of particular wrongful acts: *Anderson v. Black*, 70 Cal. 226, 229.

Evidence for the prosecution in chief, that the defendant, prior to the making and passing of the order, had gone under assumed names, and had been arrested for drunkenness, is inadmissible, and its admission is prejudicially erroneous: *People v. Arlington*, 123 Cal. 356, 358.

A defendant in a prosecution for an assault with intent to commit murder who has testified as a witness in his own behalf cannot be cross-examined as to other similar assaults committed by him, concerning which he has not testified on his examination in chief. Such evidence is immaterial to the issues, and is not admissible to impeach the defendant's character, either generally or for truth and veracity: *People v. Bishop*, 81 Cal. 113, 117.

A defendant in a criminal action, who offers himself as a witness, can only be cross-examined as to matters about which he was examined in chief, and where the defendant accused of an assault with a knife, testified in his own behalf that it was a third person who cut the prosecuting witness, and merely gave an account of how he happened to be near the scene of the assault at the time of his arrest, and

made no allusion in his evidence in chief to the fact that he had a pistol at the time, it was prejudicial error for the court to allow him to be asked upon cross-examination about a pistol: *People v. Wong Ah Leong*, 99 Cal. 440, 442.

Where a witness, Ah Sam, having stated, in response to a question asked by the defendant's counsel, that he was in jail, charged with a criminal offense, was further asked if he was in jail charged with house-breaking, the court held that this being merely a collateral matter, relating only to the credibility of the witness, and not material to the issue, the extent to which it could be pursued was in the discretion of the trial court: *People v. Ah Who*, 49 Cal. 32.

A witness cannot be impeached by evidence of particular wrongful acts, and his collateral statements, elicited on cross-examination, relative to such acts, and to his declarations concerning the same, not included in his examination in chief, and wholly outside of the issues, are conclusive, and cannot be contradicted by any other witnesses: *Steen v. Santa Clara Valley Mill etc. Co.*, 134 Cal. 355, 66 Pac. 321.

A witness cannot be impeached by evidence of particular wrongful acts: *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *Evans v. De Lay*, 81 Cal. 103, 22 Pac. 408; *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Harean*, 133 Cal. 16, 65 Pac. 9.

A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness as to such matters on cross-examination: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

Evidence of particular, wrongful acts cannot be shown for the purpose of impeachment, excepting proof of the conviction of the witness of a felony. A witness cannot be asked for such purpose whether he was not confined in jail upon a charge of cattle stealing: *People v. Silva*, 121 Cal. 668, 54 Pac. 146.

Where, to impeach a witness, a question as to a particular wrongful act is asked, but no answer is required or given, no error is committed: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 131.

**Party as Witness May be Impeached.**

A defendant who has been a witness in his own behalf may be impeached by evidence as to his general reputation: *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799.

If a defendant in a criminal case offers himself as a witness, the prosecution may introduce testimony to show that his general reputation for truth, honesty, and integrity is bad: *People v. Beck*, 58 Cal. 212.

When the defendant offers himself as a witness in his own behalf, it is competent for the prosecution to impeach his credibility as a witness by the same means by which it would impeach the credibility of any other witness; but, if no attack is made upon his credibility, he stands before the jury in the same light as any other impeached witness: *People v. Gleason*, 122 Cal. 370, 55 Pac. 123.

Where a defendant presents himself as a witness in his own behalf, he subjects himself to the same rules of testing or impeaching his credibility before the jury, as any other witness; and he may be impeached by the testimony of other witnesses that his general reputation in the community for truth, honor and integrity is bad: *People v. Hickman*, 113 Cal. 80, 45 Pac. 175.

Where the defendant offers himself as a witness, he may be impeached by proof that his general reputation for truth, honesty and integrity is bad: *People v. Prather*, 120 Cal. 660, 53 Pac. 259.

Where the defendant offers himself as a witness, his testimony is subject to the same rules as that of any other witness, and he may be impeached in the same mode as any other witness: *People v. Mayers*, 113 Cal. 618, 45 Pac. 860.

Where a party to the action becomes a witness in his own behalf, he drops for the time being the character of a party and takes that of a witness; his privilege is no greater than that of any other witness. The opposite party may prove a previous conviction of a witness for the purpose of discrediting or impeaching him: *People v. Reinhart*, 39 Cal. 449; *Clark*

v. Reese, 35 Cal. 89; People v. Johnson, 57 Cal. 571; People v. Beck, 58 Cal. 212; People v. Bentley, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799; People v. Prather, 120 Cal. 660, 53 Pac. 259; People v. Hickman, 113 Cal. 80; 45 Pac. 175; People v. Mayers, 113 Cal. 618, 45 Pac. 860.

### **Objection to Impeaching Evidence.**

Objection that certain evidence offered for purpose of impeaching witness is inadmissible for such a purpose must be made at the trial: Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811.

Where objection to impeaching evidence was general, and the court excluded the testimony, without assigning any reason, the supreme court will presume in favor of the correctness of the action of the court below: Baker v. Joseph, 16 Cal. 173.

The objection that the impeaching evidence was not confined to the place of residence of the witness must be specifically stated and is not properly raised by a general objection that the evidence is incompetent and irrelevant: Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310.

### **§ 2052. Prior Inconsistent Statements.**

A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

*Cross-references:*

Character of witness may not be impeached by party calling him, except in the case provided for in this section, section 2049; inspection of writing by adverse party, section 2054; reading writing to jury, section 2054; admissibility of impeaching evidence, section 1870, subdivision 16.

See Jones on Evidence, sections, 848, 849.

Impeachment by proof of former contradictory statements, section 848.

Same—Laying foundation, section 849.

**Contradiction of Witness by Proving Different Statements or Declarations.**

When the proper foundation is laid by the cross-examination of the witnesses as to the supposed contradictory statements, they are admissible in evidence for the purpose of impeaching his credit: *Hall v. Bark Emily Banning*, 33 Cal. 522, 524.

If the defendant calls a witness to prove the terms of a parol contract, the plaintiff may, in rebuttal, to impeach the witness, prove by another witness declarations made by defendant's witness as to what the contract was: *McCarger v. Rood*, 47 Cal. 138.

In a criminal case the prosecution may show, by other witnesses, that a witness for defendant had given a different account of what occurred at the time the offense was committed from that testified to by the witness on the stand: *People v. Nyland*, 41 Cal. 129.

Where a witness has been asked, on cross-examination, if he had not used particular expressions for the purpose of laying a foundation for contradicting him, and has denied that he has done so, the witness called to contradict him may be asked if he did not make the particular statement in question: *People v. Lee Ah Yute*, 60 Cal. 95.

Evidence that a witness for the prosecution made statements in his examination before the police court different from those made on the trial is admissible for the purpose of impeachment: *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859.

Where a defendant has offered himself as a witness in the case, a statement made by him at the coroner's inquest is admissible in evidence for the purpose of contradicting his testimony: *People v. Hong Ah Duck*, 61 Cal. 387.

When the witness for the prosecution in a case of homicide testifies inconsistently with the testimony given by him at the coroner's inquest, it is proper to call his attention to what he had testified to before the coroner, and, upon his denial of such testimony, to prove by the coroner that he did so testify: *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549.

The deposition of a witness given before a coroner's jury, and certified and returned by the coroner to the district court as required by the statute, is admissible in evidence for the purpose of contradicting the statement of the witness, made under oath, on the trial of the person accused of having murdered the deceased: *People v. Devine*, 44 Cal. 452; *People v. Furtado*, 57 Cal. 345.

The value of the opinion of a witness may be tested by showing that on a former occasion he has expressed a different opinion and by inquiring as to the grounds upon which the change of his opinion had been brought about: *People v. Donovan*, 43 Cal. 163.

Affidavits or letters of a witness which tend, although in a slight degree, to contradict his testimony, are admissible for that purpose: *Empire etc. Co. v. Bonanza etc. Co.*, 67 Cal. 406, 7 Pac. 810.

The trial court properly permitted the prosecution to read in evidence, upon cross-examination of the defendant, an affidavit made and used by him upon a motion for a new trial in a civil action instituted against him by the prosecutrix, where it appeared that the affidavit tended to contradict the statements made upon his examination in chief, and properly refused to allow the defendant to read certain affidavits therein referred to, which were not admissible for any purpose: *People v. Samonset*, 97 Cal. 448, 32 Pac. 520.

Map of survey made for purpose of partition of lands purchased by a witness and others is admissible

in evidence, on cross-examination, for the purpose of contradicting the witness: *Judson v. Molloy*, 40 Cal. 299.

Entries in book of charges, made against person who is witness on the trial, may also be received in evidence to impeach the witness: *Sill v. Reese*, 47 Cal. 294.

It is competent where plaintiff offers himself as a witness, to attempt to impeach him by verified statements in the original complaint, notwithstanding an amended complaint has been filed: *Johnson v. Powers*, 65 Cal. 179. See, also, *Estate of O'Connor*, 118 Cal. 69, 50 Pac. 4.

It may be shown on cross-examination that a witness who gives his opinion as to the value of the property formerly entertained a different opinion: *San Diego etc. Co. v. Neale*, 88 Cal. 50, 25 Pac. 977.

The error of refusing a witness to be asked on cross-examination whether he had not formerly made different statements from what he then does is not cured because his testimony is corroborated by other witnesses: *People v. Robles*, 29 Cal. 421.

It is not irrelevant to inquire of a witness on cross-examination, for the purpose of impeaching him, whether he has not on a former occasion given a different account of the matter: *People v. Robles*, 29 Cal. 421.

Where a brother of the defendant, who had been arrested, charged with the same larceny and discharged without examination, was called as a witness for the defendant, the district attorney may, on cross-examination, ask him relative to a conversation had between the witness and himself for the purpose of impeaching him, and testing his credibility: *People v. Prather*, 120 Cal. 660, 665.

In a prosecution for murder, a witness for the defense who testified on his direct examination to certain facts tending to show that the deceased, on the day of the homicide, sought to bring about a encounter between the defendant and himself, may be

cross-examined as to former statements made by him relative to the matter inconsistent with his direct testimony, and as to any matter connected with it tending to show the mental condition of the deceased toward the defendant: *People v. French*, 69 Cal. 169, 172.

Where a proper foundation has been laid for the purpose of impeaching a witness, it is error to sustain an objection to the testimony offered for that purpose before any further question has been asked: *Valensin v. Valensin*, 73 Cal. 106, 14 Pac. 397.

A witness may be cross-examined as to former statements made by him inconsistent with his direct testimony: *People v. French*, 69 Cal. 169, 10 Pac. 378.

When one called by the plaintiff as a witness testified, it was held that the defendant might prove that this witness had made to other persons a different statement of the facts in relation to the transaction from that which he had given under oath: *McDaniel v. Baca*, 2 Cal. 326, 53 Am. Dec. 339.

Where the defendant on cross-examination denied ever having had a conversation with witnesses named or with any person to the effect that he and Geddes were going on a bank deal, and that if it went through they would have money to burn, the witnesses named may be allowed in rebuttal to testify to such conversation for the purpose of impeachment: *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742.

A witness who was a member of the coroner's jury, the verdict of which was premeditated murder, and whose testimony on his direct examination as a witness upon the trial tended to rebut any presumption of premeditated murder, was properly asked upon his cross-examination in reference to his action as a member of the coroner's jury: *People v. Rader*, 136 Cal. 253, 68 Pac. 707.

### **Contradiction by Proof to the Contrary.**

Where a witness for the plaintiff denies on his cross-examination that he offered to procure testimony



in the case for the defendant if paid therefor, the defendant may impeach him by evidence to the contrary: *Lewis v. Steiger*, 68 Cal. 200, 8 Pac. 884.

When a witness is asked on his examination in chief, as to whether he had received a grant for the purpose of strengthening his testimony as to having seen and being capable of recognizing papers pertaining to the Mexican grant in controversy, it is competent to cross-examine him as to whether the grant he had received was a Mexican grant and to contradict him by showing that no such grant appeared in the Mexican archives: *Davis v. California Powder Works*, 84 Cal. 617, 24 Pac. 387.

#### **Laying a Foundation.**

A witness cannot be impeached by proof of statements inconsistent with his testimony, unless the foundation is first laid therefor by relating the statements to him, with the circumstances of times, places and persons present, and asking him whether he made such statements, and, if so, allowing him to explain them: *People v. Wade*, 118 Cal. 672, 675.

Where a defendant accused of murder was asked upon direct examination if he had been charged with killing anybody, and answered that he had not, it is proper for the prosecution, on cross-examination, to lay the foundation for impeaching him by showing that he had stated that he had been accused of the murder of a man, but that they could not prove it against him: *People v. Roemer*, 114 Cal. 51, 55.

The former statements of one who is a witness on a trial cannot be given in evidence by the opposite party, except for the purpose of impeachment, and then not unless the witness was questioned as to such former statements made by him: *Rice v. Cunningham*, 29 Cal. 492.

In laying the foundation for the impeachment of a witness by contrary declaration, section 2052 of the Code of Civil Procedure does not require that counsel, in stating the names of the persons present, should state negatively that no other persons than those named were present; and where only the two were

present, it is superfluous to state that the person spoken to was present: *Plass v. Plass*, 122 Cal. 3, 17.

The evidence of a witness cannot be impeached by proof of contradictory statements, unless a foundation is first laid for such impeaching testimony; and a conversation about which the witness was interrogated as having taken place during the progress of the trial, cannot justify evidence of a conversation had in the preceding year: *Green v. Southern Pac. Co.*, 122 Cal. 563, 566.

Upon the cross-examination of a witness as to statements made by him upon a former trial, he has the statutory right to have such previous statements presented to him and read, if in writing: *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719.

When the witness sought to be impeached by his prior written statements cannot read, or where the writing is in a language to him unknown, he is entitled to have it read to him before it can be used for the purpose of impeachment: *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201.

Evidence as to the conversations of the members of the state board of equalization cannot be used for the purpose of impeaching the members of the board, unless they have been previously questioned thereon: *People v. C. P. R. R. Co.*, 105 Cal. 576, 38 Pac. 905.

A witness cannot be impeached by evidence of contradictory statements until a proper foundation has been laid for its admission by asking the witness if he had made the statements claimed to be contradictory: *Young v. Brady*, 94 Cal. 128, 29 Pac. 489.

For the purpose of impeaching a witness, evidence of prior declarations made by him contradictory of his testimony on the trial is inadmissible, unless the attention of the witness has first been called to such declarations: *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307.

A witness cannot be impeached by proof that he has made statements out of court contrary to what he has testified to on the trial, unless the witness was asked

as to the statements made out of court, and the time when, place where, person to whom, made: *People v. Garnett*, 29 Cal. 622; *People v. Devine*, 44 Cal. 452; *People v. Salorse*, 62 Cal. 139; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088; *People v. Bush*, 65 Cal. 129, 3 Pac. 590.

Where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the precise manner of these contradictions and the time and place of the contradictory statements must be brought to the knowledge of the witness on cross-examination: *Baker v. Joseph*, 16 Cal. 173; *People v. Jenkins*, 56 Cal. 4.

In order that a witness may be impeached by evidence that his previous statements were inconsistent with those made upon the trial, the attention of the witness must be drawn with particularity to the circumstances surrounding the making of the statements and his mind directed to the very statements themselves. The proper course to be pursued when the impeaching witness is produced is to ask him the direct question, "Did the party make such statement at the time and place mentioned?" *People v. Nonella*, 99 Cal. 333, 33 Pac. 1097.

A witness was asked, "Did you not state, in the month of September, in the presence of William Knowles and James Robinson, on the way between the town here and the racetrack, that you would go into court and swear anything at all that would injure the Thomases?" to which he answered, "No." Held, that the question was sufficiently definite to lay the foundation for an impeachment of the witness: *People v. Turner*, 65 Cal. 540, 4 Pac. 553.

The question of the admissibility of evidence offered for the impeachment of a witness, by showing that after his testimony was given he had made contradictory statements, is not raised by an objection that no proper foundation has been laid for impeachment, if the objection was expressly limited to evidence of prior contradictory statements: *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493.

It is not error for the court to refuse to permit the defendant to introduce in evidence a transcript in a former action for the purpose of showing a former admission of the plaintiff, if the witness had not been asked what he had admitted or alleged in the former action, and his attention had not been called to the transcript: *Salle v. Mayer*, 91 Cal. 165, 27 Pac. 513.

On a trial for robbery, a witness cannot be impeached by showing that he had made statements on the preliminary examination inconsistent with his statements on the trial, unless his testimony given on the preliminary examination, if reduced to writing, be first shown to him. And, in the absence of any evidence to the contrary, it will be presumed that the testimony given on the preliminary examination was in writing: *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201.

A witness who identified the defendants cannot be impeached by independent proof that at the time of the identification the witness pointed out another Chinaman as the guilty party, where no foundation was laid for such impeachment by asking the identifying witness with reference to the matter: *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

Where the husband testified for the defendant that he did not know until after his wife's death that she had a bank account, testimony in rebuttal, relative to a statement made by him on the morning after her death, that she kept her own bank account, is not admissible as impeaching testimony, where no foundation was laid therefor: *Rowe v. Hibernia Sav. etc. Soc.*, 134 Cal. 403, 66 Pac. 569.

Where the payee of the note testified for the plaintiff, without any foundation being laid for impeaching his testimony, it was error to admit, against the objection of the plaintiff, evidence of other statements of the payee, introduced as inconsistent with his testimony, as to which his attention had not been called; and where such contradictory statements bore directly on a material issue, and tended to impair both the testimony of the payee and that of the

plaintiff, and to lead the jury to disregard an instruction of the court to find for the plaintiff, the error was necessarily prejudicial: *Sinkler v. Siljan*, 136 Cal. 356, 68 Pac. 1024.

The time and place of the conversation in which the alleged contradictory statement was made should be specified with such definiteness that the witness may identify the occasion: *People v. Bosquet*, 116 Cal. 75, 47 Pac. 879.

If a person, not a party, is examined as a witness, letters written by him cannot afterward be put in evidence by the party not calling him, unless, when examined as a witness, his attention is called to them, and the other party is afforded an opportunity of cross-examining him in relation to them: *Leonard v. Kingsley*, 50 Cal. 628.

#### **Laying Foundation—How Waived.**

The cross-examination of a witness as to statements made by her inconsistent with her examination in chief, without having first laid the proper foundation for impeachment as required by section 2052 of the Code of Civil Procedure, is not error, when no attempt is afterward made to contradict the witness: *People ex rel. Clough v. Levy*, 71 Cal. 618, 12 Pac. 791.

#### **Jury the Judge of the Impeachment.**

Where the motorman testified that he could not tell whether the car came in contact with the deceased, he may be impeached by the evidence of witnesses in regard to statements by him to the contrary, which he denied upon cross-examination; and it is a question for the jury whether such statements were made by the witness, as testified by the impeaching witnesses: *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 492.

The court below did not err in refusing to instruct the jury that, "A witness who has been convicted of the crime of burglary and served out a term of imprisonment for such crime is not entitled as a witness to full credit at your hands." A witness may be impeached, that is to say, the credibility to which his testimony is presumptively entitled may be re-

moved (hindered or barred) by testimony or evidence contradictory of or rendering incredible his statements, or by evidence of general bad reputation for veracity, etc. But it remains for the jury to determine whether a particular witness has told the truth in the case: *People v. McLane*, 60 Cal. 412, 413.

### **Contradictory Pleadings.**

By the verification of a complaint, the plaintiff makes its statements his own. If an amended complaint is filed, the original ceases to be a pleading, and its averments cannot be used to disprove those of the amended pleading. But when a plaintiff is a witness at the trial, the averments of the original complaint, inconsistent with his testimony, may be introduced upon cross-examination, for the purpose of impeachment: *Johnson v. Powers*, 65 Cal. 179, 180.

### **Impeachment on Former Trials.**

The effort to discredit Stewart by asking him if he had not been impeached as a witness upon a trial of a cause other than the one in which he was then testifying, was properly checked by the court upon the defendant's objection. A witness cannot be called upon thus to discredit himself, except in the mode prescribed by the statute: *Cockrill v. Hall*, 76 Cal. 192, 196.

### **Witness Cannot be Contradicted on Immaterial Matters.**

Where collateral matter is brought out on cross-examination of a witness, the party cross-examining cannot afterward rebut the evidence so called out: *Buckley v. Silverberg*, 113 Cal. 673, 45 Pac. 804.

A witness cannot be impeached by contradictory statements as to matters irrelevant to the issues; and it was not error to refuse to permit the plaintiff to be contradicted as a witness by proof that an irrelevant conversation as to future prospecting, which the plaintiff had denied, was in fact had between the plaintiff, the witness and the defendant: *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700.

Where a witness for the defendant is asked on cross-examination if he made a statement which was immaterial and not binding on the defendant, his denial that he made such statement is conclusive, and he cannot be impeached by the testimony of other witnesses, against the objection of the defendant, that he did so state: *People v. Worthington*, 105 Cal. 166, 38 Pac. 689.

Where a witness upon cross-examination testifies to a collateral matter, which is not responsive to anything concerning that which he had testified to in chief, his answer is not open to contradiction by the party cross-examining him: *Redington v. Pacific Postal Tel. Co.*, 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432.

Where a witness is cross-examined as to collateral matters not testified to in chief, the party conducting the cross-examination is bound by the answers of the witness as to such matters, and cannot contradict such answers by other evidence for the purpose of impeaching the witness; and, in such case, the fact that the witness was the guardian ad litem of the plaintiff cannot make the examination of impeaching witnesses proper or admissible: *Trabling v. California etc. Imp. Co.*, 121 Cal. 137, 53 Pac. 644.

The refusal to allow the deposition of the prosecuting witness, taken at the preliminary examination, to be read in evidence for the purpose of contradicting him, is not error, if the deposition fails to show any material contradiction of his testimony as given at the trial: *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500.

A party cannot cross-examine his adversary's witness upon irrelevant or collateral matters for the purpose of eliciting something to contradict or impeach him; and the court should stop the inquiry there, if such matters are drawn out, and not allow contradictory evidence to be introduced in rebuttal: *People v. Tiley*, 84 Cal. 651, 29 Pac. 290; *Evans v. De Lay*, 81 Cal. 103, 22 Pac. 408.

Where a witness for the defendant, after he had been cross-examined, is recalled by the prosecution

for further cross-examination, in order to lay a foundation for his impeachment, the answers of the witness given on his further cross-examination concerning matters collateral to the issues are binding on the prosecution, and as to them he cannot be contradicted: *People v. Webb*, 70 Cal. 120, 11 Pac. 509.

In an action for slander, committed in charging that plaintiff participated in a theft, where the convicted thief, on cross-examination by the plaintiff's counsel, testified that he was told by a third person while under arrest that the whole matter of the stealing had been settled, and that plaintiff's name was mentioned in the conversation, such third person cannot be called for the plaintiff to contradict the statement thus brought out: *Barkly v. Copeland*, 86 Cal. 483, 21 Pac. 1, 3.

#### **Impeachment on Collateral Matters.**

A qualification of the rule governing the impeachment of witnesses by proof of contradictory statements elsewhere made by them is, that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relative to the issue being tried: *People v. Devine*, 44 Cal. 452; *People v. Furtado*, 57 Cal. 345.

A witness cannot be impeached by contradicting him upon collateral matters: *People v. Dye*, 75 Cal. 108, 16 Pac. 537.

A witness cannot be impeached by evidence of contradictory statements as to a matter which is wholly irrelevant to any material issue: *Young v. Brady*, 94 Cal. 128, 29 Pac. 489.

It is not permissible to impeach a witness by contradicting his statements in regard to a purely collateral matter brought out on cross-examination: *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1, 3.

Where a question is put to a witness as to a matter collateral or irrelevant to the issue, his answer is conclusive upon the party asking the question, and it cannot be used as a foundation for impeachment: *Pierce v. Schaden*, 59 Cal. 540; *People v. McKeller*, 53 Cal. 65; *People v. Bell*, 53 Cal. 119.



Where a witness for the defendant, after he had been examined and cross-examined, is recalled by the prosecution for further cross-examination, in order to lay a foundation for his impeachment, the answers of the witness given on his further cross-examination concerning matters collateral to the issues are binding on the prosecution, and as to them he cannot be contradicted: *People v. Webb*, 70 Cal. 120, 11 Pac. 509.

A witness cannot be impeached by evidence of particular wrongful acts; and his collateral statements, elicited on cross-examination, relative to such acts, and to his declarations concerning the same, not included in his examination in chief, and wholly outside of the issues, are conclusive, and cannot be contradicted by other witnesses: *Steen v. Santa Clara Valley M. & L. Co.*, 134 Cal. 355, 357.

The defendant cannot impeach a witness called by himself, by proof of contradictory statements made by him, unless the testimony of the witness is prejudicial to his case; and where a witness for the defendant testified that he saw a rock about the size of a goose egg within three feet from the left hand of the deceased when his body was found, it is not error for the court to refuse to permit him to be impeached by proof that he had stated to others that deceased had a rock in his left hand, the only effect of a successful impeachment being to eliminate the rock from the case, to the prejudice rather than to the benefit of the defendant; and hearsay evidence is not admissible to prove as a fact a different location of the stone from that testified to by the witness: *People v. Conkling*, 111 Cal. 616, 623.

The rules that a witness cannot be cross-examined as to a matter which is irrelevant to the issue merely for the purpose of contradicting him by other evidence, and that, if a question is put to a witness on cross-examination which is irrelevant, his answer cannot be contradicted by the party who asked the question, do not apply when the question asked calls for a response in respect to a matter which the party asking the question would have the

right to prove as an independent fact: *People v. Chin Mook Sow*, 51 Cal. 597.

If the testimony tending to impeach a witness is immaterial, it cannot be held to have injured the party calling him, if it does not appear that the testimony impeached was material: *People v. Murray*, 85 Cal. 350, 24 Pac. 666.

Where a mechanical engineer, employed as port engineer, testified for the defendant that he had regulated the quantity of coal taken on a steamship each trip, and identified a certificate as to the quantity of a kind of coal consumed ordinarily by the steamship upon its trip, and as to the relative quality of that and a different kind of coal, it cannot be an error prejudicial to the defendants, in whose favor a finding was made upon the question involved, to allow the plaintiff to offer such certificate in evidence while the witness was upon the stand for the purpose of contradicting his previous evidence as to the relative value of the two kinds of coal, though the contradiction was not material: *Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 33 Pac. 550.

Where a witness for the prosecution upon a charge of murder was asked, upon cross-examination, whether he had not been paid for executing a bond for certain Chinamen under the internal revenue laws, and admitted that he had executed the bond, but denied that he was paid for it, it is not admissible for the defendant to attempt to prove by another witness that the people's witness was paid for going upon the bond: *People v. Collins*, 105 Cal. 504, 39 Pac. 16.

#### **Impeachment, Contradicting on Immaterial Matters is Harmless, When.**

The allowance of questions, asked for the purpose of contradicting a witness for the defendant upon immaterial matters, is not injurious to the defendant, where no attempt was made to contradict the witness on one of the questions asked, and where the contradiction proved in answer to the other question was wholly unimportant, and would not justify a reversal of the judgment: *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136.

**Right to Explain Testimony.**

Upon the cross-examination of a witness for the prosecution, an affidavit made by the witness was offered by the defendant for the purpose of impeaching her testimony. Held, that the circumstances under which the affidavit was made, and the conversation had by the witness with the person at whose instance it was made, were admissible as parts of the transaction: *People v. Smallman*, 55 Cal. 185.

An entry in a memorandum-book is subject to explanation by the party making it to the same extent as it would have been had the words been spoken instead of being written: *Rice v. Heath*, 39 Cal. 609.

Where the attention of a witness is called upon the cross-examination to his deposition taken before the justice of the peace at the preliminary examination for purposes of impeachment, he has a right, upon redirect examination, to explain his former testimony; and it is reversible error to refuse to permit him to do so, on the alleged ground that the deposition is a record which cannot be explained or varied: *People v. Lambert*, 120 Cal. 170, 52 Pac. 307.

If a person not a party to an action is examined as a witness, letters written by him cannot afterward be put in evidence by the party not calling him, unless, when examined as a witness, his attention is called to them, and the other party is afforded an opportunity of cross-examining him in relation to them: *Leonard v. Kingsley*, 50 Cal. 628.

Where, to contradict the testimony of the prosecutrix, who was a child of eleven years, the defense read her testimony before the committing magistrate, it was proper for the court to allow the prosecution to recall her and to ask her to explain the discrepancies: *People v. Wessel*, 98 Cal. 352, 33 Pac. 216.

Plaintiff may properly be permitted to explain in rebuttal a telegram introduced by the defendant for the purpose of contradicting his testimony: *Bradford v. Woodworth*, 108 Cal. 684, 41 Pac. 797.

**Contradictory Statements—Exact Language not Necessary.**

The court in its discretion over the subject matter of the examination of an impeaching witness, as to the declarations of the plaintiff against his interest may permit the question to be asked whether plaintiff did not state the precise contradictory words repeated, "or words to that effect": *Bernardis v. Allen*, 136 Cal. 7, 68 Pac. 110.

**Contradictory Statements Must be Prior.**

A witness, absent from the state, whose testimony, given at the preliminary examination, was read to the jury, cannot be impeached by proof that since the preliminary examination, the witness had made statements to third parties in contradiction of his testimony: *People v. Compton*, 132 Cal. 484, 64 Pac. 849.

**Purpose of Impeaching Testimony.**

The rule as to evidence of contradictory statements applies equally to evidence of declarations or acts of hostility or ill-feeling on the part of the witness. There is no distinction between admitting declarations of hostility of the witness, by way of impairing the force of his testimony, and admitting contradictory statements, so far as this rule is concerned: *Baker v. Joseph*, 16 Cal. 173.

**Impeaching Testimony Cannot be Used to Make Affirmative Case.**

Where a witness is questioned by the party calling him as to statements previously made by him, which, if true, would corroborate the testimony of such party, the party calling him will not be permitted, upon a denial of the witness as to the making of such statements, to contradict the testimony of his own witness by the testimony of his attorney to the previous statements made by the witness under the circumstances stated in the questions put to the witness: *Estate of Kennedy*, 104 Cal. 429, 38 Pac. 90.

Where the grantor had been called as a witness to prove that a deed was intended as a mortgage, and had testified that the transaction was a sale, and

that the relation of debtor and creditor did not continue between himself and the grantee after the execution of the deed, contrary declarations of the grantor could only be shown by the defendants to explain why they had called a witness adverse to them, and not then, unless they were surprised by his testimony; and beyond this, the evidence of contrary declarations subsequent to the execution of the deed is entitled to no weight, and could have no force in making an affirmative case for the defendants: *Hyde v. Buckner*, 108 Cal. 522, 41 Pac. 416.

The witness cannot be confirmed by proof that he has given the same account before, for his mere declaration is not evidence. His having given a different account, although not upon oath, necessarily impeaches his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath. Such declarations may, however, be admissible, in contradiction of evidence tending to show that the account is a fabrication of late date, where it may be shown that the same account was given before its ultimate effect and operation (arising from a change of circumstances) could have been foreseen; and also, perhaps, in other peculiar cases: *People v. Doyell*, 48 Cal. 90.

### **Consistent Statements.**

The impeachment of the attachment debtor, who has testified as a witness for the plaintiff to the validity of the sale, by evidence on the part of the defendant, of statements made by the witness inconsistent with his testimony, and by showing that his reputation for truth was bad, cannot be rebutted by proof on the part of the plaintiff that the witness had made prior statements consistent with his testimony at a time so far remote as to preclude the idea of fabrication: *Mason v. Vestal*, 88 Cal. 396, 22 Am. St. Rep. 310, 26 Pac. 213.

Where an attempt is made to impeach a witness by showing that his testimony was given under the influence of some motive prompting him to make a false statement, evidence is admissible to show that he

made prior similar statements at a time when the imputed motive did not exist; and the admission of such prior statements before any evidence tending to impeach his motives has been introduced is not a prejudicial error, if such impeaching evidence is subsequently given: *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307.

#### **Contradicting Witness by Statements of Third Persons.**

Evidence of statements made by one person are inadmissible for the purpose of contradicting another: *Jepsen v. Beck*, 78 Cal. 540, 21 Pac. 184.

#### **Impeaching Witness—Testimony at Former Trial.**

On second trial, plaintiff may introduce testimony of defendant given on a former trial, even if the defendant is present in court: *Lorenzana v. Camarillo*, 45 Cal. 125.

The plaintiff was examined as a witness on his own behalf, and testified fully in relation to the matters in controversy. On cross-examination, he was asked as to certain statements on the subject, claimed to have been made by him as a witness in another case. This was objected to on the ground that the record in the case had not been produced. The court overruled the objection. Held, that the production of the record was unnecessary, and that the objection was properly overruled: *Moran v. Abbey*, 63 Cal. 56.

The district attorney, on cross-examination of the defendant, may by way of impeachment read questions asked of him upon a former trial from a transcript of his testimony taken at such trial, and inquire whether at the former trial—giving the time and place when and where it occurred—he had testified so and so, putting the question: *People v. Fitzgerald*, 138 Cal. 39, 42.

#### **Deposition on Preliminary Examination.**

The deposition of the defendant, taken upon his preliminary examination, properly certified by the shorthand reporter, as required by the code, is admissible in evidence upon the trial to impeach his

testimony, his attention having been first called to it; and the provision of section 686 of the Penal Code permitting such deposition to be read upon the trial, only where the witness is dead or insane, or absent from the state, does not prevent its use to impeach a witness who is present: *People v. Hawley*, 111 Cal. 78, 43 Pac. 404.

### § 2053. Evidence of Good Character.

Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

#### *Cross-references:*

Order of proof is in discretion of court, section 2042; evidence of bad character may be given by adverse party, sections 2051, 1847.

See *Jones on Evidence*, section 868—Sustaining an impeached witness—Laying foundation.

#### **Evidence of Good Character of Witness not Admissible Before His Character has been Impeached.**

Evidence of the good character of a witness cannot be given until his character has been attacked by evidence that his reputation for truth, honesty and integrity is bad: *People v. Bush*, 65 Cal. 129, 3 Pac. 590.

Evidence is not admissible to prove that the character of a witness for truthfulness is good, unless the opposite party has tried to impeach him by showing that his general reputation is bad: *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228.

The general rule is that in civil actions, evidence of the good character of the defendant is not admissible, and the exceptions consist mostly of cases where the character of some person is the very issue involved;

but an action for assault and battery is not one of the exceptions: *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

In a civil action for assault and battery, evidence of the general reputation of the defendant for peace and quiet is not admissible: *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

**Evidence of Good Character of Witness Admissible After His Character has been Impeached.**

Where a plaintiff in rebuttal introduces evidence in contradiction of the witnesses of the defendants, it is competent to the latter, after the plaintiff has rested, to support their credibility by the introduction of additional testimony: *Wade v. Thayer*, 40 Cal. 578.

If the defendant proves that a witness, called and examined by the prosecution, has been convicted of a felony, it is an assault upon the character of the witness for integrity and truth, and the prosecution may, in rebuttal, examine witnesses to prove that the reputation of the witness for truth and integrity is good in the community where he resides: *People v. Amanacus*, 50 Cal. 233.

If a defendant introduces evidence on a trial for murder, tending to show that one of the people's witnesses was suborned, and had been paid for his testimony, the prosecution in rebuttal may introduce testimony to show the good character of the witness for truth and veracity: *People v. Ah Fat*, 48 Cal. 62.

On a trial for murder, if the defense introduce evidence respecting the character of the deceased, the prosecution may give evidence in answer thereto: *People v. Iams*, 57 Cal. 115.

**Character Must be Proven by Reputation.**

For the purpose of impeaching the veracity of a witness, it is not competent to base belief on personal knowledge as distinguished from general reputation: *People v. Methvin*, 53 Cal. 68.

In a prosecution for burglary, a certificate of the discharge of the defendant from the United States



army, certifying to his good character is not admissible as evidence of his good character: *People v. Eckman*, 72 Cal. 582, 14 Pac. 359.

It is error to strike out the evidence of a witness called to sustain the reputation of another witness for truth, honesty and integrity, against an attempted impeachment thereof, on the ground that the witness had never heard such reputation discussed, or talked with any one about it, if he states that he has known the witness personally for twenty-seven years, and knows what his reputation is, and that it is good: *First Nat. Bank of Oakland v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748.

A witness introduced to sustain the character of a witness whose reputation has been attacked, was asked (by the district attorney) the question: "From what you know of him, would you believe him under oath?" Held, that the question was improper, but, as it was asked and answered without objection, there was no error: *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73. Witness cannot be asked as to the general reputation of the accused for peace and quiet, if witness has never heard such reputation discussed; nor will the refusal to allow such question be deemed fatal error if accused's good reputation has been established by many witnesses, and no evidence to impeach the same has been offered by the prosecution: *People v. Moan*, 65 Cal. 532, 4 Pac. 545; *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500.

#### § 2054. Right to Inspect Writing Shown Witness.

Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

*Cross-references:*

Adverse party may inspect writing shown witness to refresh memory, section 2047; prior written or inconsistent statements must be shown witness before examination as to the same, section 2052; mode of examination is generally in discretion of court, section 2044; recalling witness is in discretion of court, section 2050; witness must remain until testimony closed, section 2066.

**Right of Inspection—Writing Shown Witness May be Inspected by Opposite Party.**

After deeds or other documents have been admitted in evidence, the opposite counsel have a right to inspect them at any time during the progress of the trial: *Pope v. Dalton*, 40 Cal. 638.

If a witness is called to identify papers in order to lay the foundation for introducing them in evidence, the opposing counsel is entitled to an inspection of the papers before the close of the testimony, in order to enable him to offer testimony in explanation of the papers, or to disprove their authenticity: *People v. Stevens*, 52 Cal. 457.

## TITLE IV.

### OF THE EFFECT OF EVIDENCE.

- § 2061. Jury judges of effect of evidence, but to be instructed on certain points.  
What is a "proper occasion."  
Instructions need not be repeated.  
Review on appeal where verdict disregarded by court.  
Falsus in uno, falsus in omnibus.  
Caution as to oral admissions.  
Caution as to testimony of accomplices.  
Burden of proof, civil case.  
Burden of proof, criminal case.  
Burden of proof in libel case involving accusation of crime.

§ 2061. Jury Judges of Effect of Evidence, but to be Instructed on Certain Points.

The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions—

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.

3. That a witness false in one part of his testimony is to be distrusted in others.

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond a reasonable doubt.

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

*Cross-references:*

What facts may be proven on the trial, section 1870; province of jury, section 2101; all questions of fact are addressed before jury, section 2101; provisions respecting evidence on trial before a jury are equally applicable on other trials, section 2103; jury are exclusive judges of credibility, section 1847; inferences, section 1960; conclusive evidence defined, section 1837; no evidence conclusive unless so declared by the code, section 1978; judgments and orders, when conclusive, section 1908; recitals in statutes, when conclusive, section 1903; credibility of parties, beneficiaries, etc., section 1879; religious belief as affecting credibility, section 1879; jury may make comparison of handwriting, section 1944; jury are bound to accept judicial knowledge as declared by the court, section 2102.

Subdivision 1. Evidence defined, section 1823; how inferences must be founded, section 1960; province of jury, section 2101.

Subdivision 2. Satisfactory evidence only will justify a verdict, section 1835; jury are exclusive judges of the credibility of witnesses, section 1847; number of witnesses, section 1844; presumptions defined, section 1952; how controverted, section 1961; conclusive presumptions, section 1962; disputable presumptions, section 1963; jury bound to find according to presumption, unless it is converted, section 1961; credibility of witnesses may be affected by the manner of testifying, section 1847; two witnesses to prove perjury or treason, section 1968; moral certainty required, section 1826.

Subdivision 3. Presumption that witness speaks the truth, section 1847; how repelled, section 1847; impeachment of witness by evidence of bad character, section 2051; the conviction of felony, section 2051; of previous inconsistent statements, section 2052.

Subdivision 4. What witnesses are entitled to full credit, sections 1879, 1880; where witness testifies from writing without independent recollection his evidence is to be received with caution, section 2047; admissions are indirect evidence, section 1832; confes-

sions in actions for divorce, section 2079; admissions of parties may be proven on the trial, section 1870, subdivision 2; convict may testify, section 1879; presumption arising from admission of party, section 1962, subdivision 3; evidence of declaration of a co-conspirator may be given on the trial, section 1870, subdivision 6.

Subdivision 5. Direct evidence of one witness sufficient to prove any fact except perjury or treason, section 1844; what evidence will justify verdict, section 1835; the court may stop introduction of evidence where fact is proven beyond reasonable doubt, section 2044; burden of proof, section 1981; each party must prove his own affirmative allegations, section 1869.

Subdivision 6. Evidence need not be given of a negative allegation where it is the denial of the existence of a document the custody of which belongs to the adverse party, section 1869; secondary evidence defined, section 1830; indirect evidence defined, section 1832; presumption is that evidence willfully suppressed would be adverse if produced, section 1963, subdivision 5; presumption is that higher evidence would be adverse from inferior being produced, section 1963, subdivision 6.

Subdivision 7. Primary evidence defined, section 1829; secondary evidence defined, section 1830; direct evidence defined, section 1831; indirect evidence defined, section 1832, and see cross-references under those sections; satisfactory evidence defined, section 1835; presumption is satisfactory unless controverted, section 1963; presumption is that evidence willfully suppressed would be adverse if produced, section 1963, subdivision 5; that higher evidence would be adverse from inferior being produced, section 1963, subdivision 6.

See Jones on Evidence, sections 171, 903-905.  
Province of judge and jury, section 171.  
Credibility of witnesses, sections 903-905.

Subdivision 1, section 171.  
Province of judge and jury, section 171.

Subdivision 2, section 902.  
Number of witnesses, section 902.

Subdivision 3, section 905.  
Credibility of witnesses, section 905.

Subdivision 4, sections 787, 903.  
Accomplices, section 787.  
Credibility of witnesses, section 903.

Subdivision 5, section 902.  
Number of witnesses, section 902.

Subdivision 6, section 17.  
Presumptions from withholding evidence, section 17.

Subdivision 7, section 17.  
Presumptions from withholding evidence, section 17.

### **What is a "Proper Occasion."**

An instruction is erroneous if there is no evidence tending to establish the hypothesis upon which it is based: *Perkins v. Eckert*, 55 Cal. 400, 404.

An instruction based upon subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure, in reference to the effect of the failure of a party to produce stronger and more satisfactory evidence than that offered when in his power to do so, ought rarely, if ever, to be given in a criminal case in which the jury are the sole and exclusive judges of the weight of evidence; and if the only plausible application of such an instruction is to the failure of the defendant to testify in his own behalf, it is prejudicially erroneous: *People v. Cuff*, 122 Cal. 589, 591.

Subdivision 4 of section 2061 of the Code of Civil Procedure, providing that the court shall instruct the jury in a criminal prosecution "on all proper occasions" that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution," does not require the court to charge the jury with respect to matters of fact; and though it is not a proper occasion for such an instruction where it would discredit one of the defendant's witnesses, it is a proper occasion therefor when the testimony therein referred to

is offered for the people against the defendant: *People v. Bonney*, 98 Cal. 278, 279.

In an action by a broker against the administrator of the estate of the deceased vendor of the stock, where testimony introduced by the defendant tends to prove oral admissions by plaintiff that he had never found a purchaser for the stock, it is not a proper occasion for an instruction to the jury, at the request of the plaintiff, that evidence of the oral admissions of a party ought to be received with caution by the jury: *Mattingly v. Pennie*, 105 Cal. 514, 523.

**Instructions Need not be Repeated.**

The court in its charge to the jury had substantially given the proposition to them as law; and as we have repeatedly held, a court is not bound to repeat any of its instructions: *People v. McCoy*, 71 Cal. 395, 397.

**Review on Appeal Where Verdict Disregarded by Court.**

Where special issues in an equity case are submitted to a jury, the verdict is only advisory to and not binding upon the court, and erroneous instructions to the jury will not be reviewed on appeal if the court disregards the verdict and finds the facts for itself: *Sweetset v. Dobbins*, 65 Cal. 529, 530.

**Falsus in Uno, Falsus in Omnibus.**

An instruction that if the jury "believed any witness had, upon the stand, willfully sworn falsely in respect to any matter material to the issue on trial, they should disregard his testimony altogether," was properly refused: *People v. Hicks*, 53 Cal. 354, 355.

It is not error to instruct the jury that "if any witness has, in their judgment, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution": *People v. Righetti*, 66 Cal. 184, 185.

Under section 2061, division 3, of the Code of Civil Procedure, a witness false in one part of his testimony is to be distrusted in others, and an instruction



to the jury that such a witness may be distrusted is error: *White v. Disher*, 67 Cal. 402, 403; *People v. Paulsell*, 115 Cal. 6, 12.

An instruction that "a witness false in one part of his testimony is to be distrusted in other parts" is not erroneous, although the word "willfully" is not inserted immediately before the word "false" in the instruction: *People v. Treadwell*, 69 Cal. 226, 238.

The court also, in its charge, used these words: "If you are satisfied that any witness has willfully testified falsely in regard to any one person, or any one particular fact in the case, then you are authorized to distrust his or her testimony in all particulars; that is, you may reject it entirely if you choose to do so, or you may reject it in part, and receive it in part, as you find it contradicted or sustained by other testimony, as you are satisfied of its truth or falsity." Held, no error: *People v. Flynn*, 73 Cal. 511, 515.

Granted that it does appear on a comparison of the finding and the evidence that the court below must have found that the plaintiff testified falsely as to Sharon's introducing her as his wife, still the law does not require the rejection of her testimony on other points. The rule for the guidance of the trial court is thus expressed in the code: "That a witness false in one part of his testimony is to be distrusted in others." I cannot go so far as to say that this distrust was not exercised, and that the credibility of the plaintiff was not weighed by the trial court according to the mandate of this rule. The credit to be given to the witness was for the court below, and not for this court. Admitting that this court might go further on an extreme case, I cannot say on this record that this is such a case: *Sharon v. Sharon*, 79 Cal. 633, 692.

It is not error to instruct the jury that if they believe any witness has willfully testified falsely to any material fact, it is their duty to discredit him. The verbs "discredit" and "distrust" have substantially the same meaning: *People v. Clark*, 84 Cal. 573, 583.

Where the defendant requested an instruction substantially covering the provision of section 2061, subdivision 3, of the Code of Civil Procedure, that "a witness false in one part of his testimony is to be distrusted in others," a modification of the instruction by the word "willfully" before the word "false" did not render the instruction erroneous, nor change the effect of the instruction as offered: *People v. Luchetti*, 119 Cal. 501, 507; *People v. Sprague*, 53 Cal. 491, 494.

An instruction requested that: "If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence," is an accurate exposition of the meaning of subdivision 3 of section 2061 of the Code of Civil Procedure, and should have been given without modification. The important element that the willfully false testimony must be upon a material matter, should be expressed in the instruction, though not expressed in the code: *People v. Plyler*, 121 Cal. 160, 163.

An instruction to the effect that a witness willfully false in one part of his testimony is to be distrusted wholly, cannot properly be applied to any particular witness or witnesses for one party, singled out by the instruction, but should only be given in such general terms as to apply to all witnesses whether for the plaintiff or for the defendant. To specify any witness for either party tends to convey to the jury the impression that the particular witness is disbelieved by the judge: *Thomas v. Gates*, 126 Cal. 1, 4.

An instruction "that a witness false in one part of his or her testimony, as the case may be, is to be distrusted in others, and if you find that any witness in this case has willfully testified to entirely disregard and cast aside the testimony of such witness," is correct, and does not unduly amplify the language of subdivision 3 of section 2061 of the Code of Civil Procedure: *People v. Arlington*, 131 Cal. 231, 233.

The instruction that "a witness who willfully testifies falsely as to one fact in giving his testimony is to be distrusted in other parts of his testimony,"

is in substantial accord with the Penal Code. The addition thereto, "If you find that a witness has deliberately testified falsely in one part of his testimony in this case, you have the right to reject the whole testimony of that witness which is not shown by other evidence to be true," though it could well be omitted, leaves the credibility of the witness with the jurors, and is not substantially erroneous: *People v. Wilder*, 134 Cal. 182, 184.

It was not error to instruct the jury that if any witness examined before them, or whose testimony taken elsewhere had been read to them, had willfully sworn falsely as to any matter, it is their duty to distrust the entire evidence of such witness: *People v. Fitzgerald*, 138 Cal. 39, 45.

#### **Caution as to Oral Admissions.**

An instruction requested by the defendants to the effect that the verbal admissions of a party should be received "with great caution" is properly modified by striking out the word "great"; and where such requested instruction contained matter of encroachment upon the province of the jury, for which it might have been refused, defendants cannot complain upon appeal of error of the court in giving it: *People v. Van Horn*, 119 Cal. 323, 332.

Instruction invading the province of the jury in cautioning them against testimony of oral admissions and statements should be rejected. Any instruction given on that subject should be confined as nearly as possible to the language of subdivision 4 of section 2061 of the Code of Civil Procedure: *People v. Rodley*, 131 Cal. 240, 243.

#### **Caution as to Testimony of Accomplices.**

In a criminal prosecution, an instruction to the jury that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution," is erroneous, where the accomplice has been called as a witness by the defendant, and not by the prosecution. Such instruction tends to discredit a witness for the defend-

ant, and charges the jury with respect to matters of fact: *People v. O'Brien*, 96 Cal. 172, 181.

Under section 2061 of the Code of Civil Procedure, it is the duty of the court, upon a proper occasion, to instruct the jury that "the testimony of an accomplice ought to be viewed with distrust"; and it is error to refuse to give such an instruction in a proper case when orally requested by the defendant, on the ground that counsel had not handed up to the court the charge in writing, as required by a rule of the court. Such request did not come within the reason or spirit of the rule, and should have been granted: *People v. Silva*, 121 Cal. 668, 670.

A proposed instruction to the effect that the evidence of an accomplice is to be viewed with caution and distrust, is not vitiated by the use of the word "caution" in addition to the word "distrust" employed in subdivision 4 of section 2061 of the Code of Civil Procedure, and it is error to refuse such instruction when requested by the defendant, and warranted by the evidence of accomplices, and such error is manifestly prejudicial when the court instructed the jury to judge the testimony of accomplices, when corroborated, as they did the testimony of other witnesses: *People v. Sternberg*, 111 Cal. 11, 14.

#### **Burden of Proof, Civil Case.**

It may require more evidence to overthrow a presumption that one has not committed an affirmative or positive and active fraud than that he has not denied an honest debt; but such a difference should be called to the attention of the jury in language of careful discrimination, lest they should be led to the belief that a mere preponderance of evidence will not justify a verdict of guilty of fraud in a civil case: *Bullard v. His Creditors*, 56 Cal. 600, 603.

When the court instructs the jury that the plaintiff must prove the fault or negligence of the defendant to the satisfaction of the jury by a preponderance of evidence, it is not error to refuse further to instruct them that the plaintiff must make such proof to a moral certainty. The "moral certainty" re-

quired by section 1826 of the Code of Civil Procedure is when a matter is proved to the satisfaction of a jury by a preponderance of evidence: *Treadwell v. Whittier*, 80 Cal. 574, 603.

#### **Burden of Proof, Criminal Case.**

It is not error to instruct the jury in a criminal case, in connection with the subject of reasonable doubt, that their opinion of the guilt of the defendant must nearly approach absolute conviction, to justify a verdict of guilty; but it is error to instruct the jury that the defendant is entitled to an acquittal, "unless they seriously believe he is guilty," such qualifying clause being too ambiguous, doubtful and uncertain in its import to be clearly consistent with the rule that the evidence must satisfy the jury of the guilt of the defendant to a moral certainty, and beyond a reasonable doubt: *People v. Ferry*, 84 Cal. 31, 33.

It is erroneous to instruct the jury in a criminal case, where the evidence is circumstantial, that "when direct evidence cannot be produced, minds will act on the probabilities of the case, and that they should be governed by the superior number of probabilities on the side of the people or the defendant": *People v. Sansome*, 84 Cal. 449, 456.

#### **Burden of Proof in Libel Case Involving Accusation of Crime.**

The court instructed the jury that "in order to make good his defense, the defendant is required to prove the plaintiff guilty of the crimes imputed to him by the slanderous words, by testimony sufficient to convict the plaintiff of those charges on a criminal trial; and if the defendant has failed to do this, the jury must find for the plaintiff. This correctly states the law. "To support a special plea in justification where crime is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him; and it is conceived that he would be entitled to

the benefit of any reasonable doubts of his guilt, in the minds of the jury, in the same manner as in a criminal trial. This is the rule at common law, and it has not been changed by section 2061 of the Code of Civil Procedure, in subdivision 5: *Cook v. Norman*, 50 Cal. 631, 633.

## TITLE V.

### OF THE RIGHTS AND DUTIES OF WITNESSES.

- § 2064. Witness must attend.  
Forfeiture of bail where witness has given security to appear.  
Witness fees.  
Right to explain testimony.
- § 2065. Duty and privilege of witness.  
Person cannot be compelled to be a witness against himself in a criminal action.  
Immaterial questions need not be answered.  
Right to claim privilege.  
Record, when necessary to prove conviction.  
Answers tending to degrade.  
Special cases where exemption cannot be claimed.  
Previous arrest.  
Conviction of felony.  
Conviction of misdemeanor.
- § 2066. Protection of witness.  
Security for attendance.  
Insulting question.  
Unreasonable detention of witnesses.  
Previous impeachment.
- § 2067. Privilege of witness from civil arrest.
- § 2068. Wrongful arrest of witness—Penalty.
- § 2069. Officer, when exonerated for unlawful arrest.
- § 2070. Discharge of witness from arrest.

#### § 2064. Witness Must Attend.

A witness, served with a subpoena, must attend at the time appointed, with any papers un-

der his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

*Cross-references:*

Subpoena defined, section 1905; may require production of books, etc., section 1985; how issued, section 1986; how served, sections 1987, 1988; when witness is not compelled to attend, section 1989; person in court need not be served with subpoena, section 1990; disobedience to subpoena how punished, sections 1991, 1992; witness attending trial privileged from arrest in civil suit, section 2067 et seq.; witness must answer legal and pertinent questions, section 2065; witness defined, section 1878; who may be witnesses, section 1879; who may not, section 1880; privileged communications, section 1881; examination of witness, section 2042 et seq.; oral examination defined, section 2005; all parties may cross-examine witness, section 1846; court to regulate mode of interrogation, section 2044; refreshing memory, section 2047; cross-examination, section 2048; what evidence may be given on trial, section 1870; recalling witness, section 2050.

See Jones on Evidence, section 799—Mode of compelling attendance.

**Forfeiture of Bail Where Witness has Given Security to Appear.**

When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail: Pen. Code, 1332.

**Witness Fees.**

The district court has jurisdiction, when a witness is poor, or has come from a place out of the country, and has attended as a witness on behalf of the people, to make an order directing the county treasurer to



pay the witness a sum to be named in the order for his expenses: *Sargent v. Cavis*, 36 Cal. 552.

If the venue of such action is changed, the order should direct the sum allowed to be paid by the treasurer of the county where the indictment was found: *Sargent v. Cavis*, 36 Cal. 552.

The question whether an order made by the court for a county treasurer to pay a witness his expenses should be presented to the board of supervisors, to have the sum therein allowed audited by them, before the treasurer is compelled to pay the same, not decided: *Sargent v. Cavis*, 36 Cal. 552.

A party in whose favor judgment is rendered, who voluntarily attends the trial without being subpoenaed by the opposite party, and while there is called as a witness by the latter, is not entitled to witness fees or mileage: *Beal v. Stevens*, 72 Cal. 451, 14 Pac. 186.

The fact that the court ordered the clerk to retain in his possession until further order the amount ordered to be paid by the plaintiff to the clerk for witness fees cannot be objected to by the plaintiff, as he is not injured thereby: *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732.

### **Right to Explain.**

At the trial the accused, who had been sworn as a witness on his own behalf, was asked, on cross-examination, if he had not made certain statements (which were repeated to him), involving apparently important admissions against himself, to which he answered: "I said words to that effect, but not exactly in that way." It was held to be error to deny to the accused the right to disclose exactly what he did say, and to state the whole conversation at that time, relating to the same subject matter: *People v. Murphy*, 39 Cal. 52.

In a prosecution for rape, where, to contradict the testimony of the prosecutrix, who was a child of eleven years, the defense read her testimony before the committing magistrate, it was proper for the court to allow the prosecution to recall her and to

ask her to explain the discrepancies: *People v. Wessel*, 98 Cal. 352, 33 Pac. 216.

### § 2065. Duty and Privilege of Witness.

A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

#### *Cross-references:*

Witness must answer all legal and pertinent questions, section 2064; and must remain until close of the testimony, section 2064; who may be witnesses, section 1879; interested persons may be witnesses, section 1879; who may not be witnesses, section 1880; privileged communications, section 1881; evidence may be given on the trial of precise fact in issue, section 1870; conviction of felony may be shown by examination of witness or record of judgment, section 2057; convicted person is competent as a witness, section 1879; refusal to answer how punished, section 1991; protection of witness confined in jail or prison, section 1995 et seq.; protection of witness from irrelevant, impertinent or insulting questions, section 2066; witness protected from unreasonable detention, section 2066; witness to be examined only as to matters legal and pertinent to the issue, section 2066; admissions in general, section 1870, subdivision 3, and cross-references thereunder.

See Jones on Evidence, sections 736, 834, 836-846, 840, 887-895.

Questions not affecting credibility, but merely tending to prejudice, inadmissible, section 836.

Method and extent of cross-examination—Discretion of the court, section 837.

Limitations on right of cross-examination, section 838.

Questions tending to degrade the witness, section 839.

Same—Such questions admissible when material to the issue, section 840.

Same—Where question calls for immaterial facts, section 841.

View that the matter rests in the discretion of the trial judge, section 842.

Same—Illustrations of the exclusion of such questions, section 843.

Cross-examination of party, section 844.

Same—In criminal cases, section 845.

Actions where the chastity of women is in issue, section 846.

Witnesses not compelled to criminate themselves, section 887.

Matters tending to criminate privileged, section 888.

Statements of witness claiming privilege not conclusive, section 889.

Privilege extends to acts as well as words—When to be claimed, section 890.

No privilege, if testimony cannot be used to convict the witness, sections 891, 892.

Privilege—How claimed—How waived, section 893.

Effect of claiming privilege—Inferences, section 894.

Same—Penalties and forfeitures, section 895.

Questions tending to degrade the witness, section 839.

Such questions admissible when material to the issue, section 840.

Disability—How proved—How removed, section 736.

Infamy as a ground of incompetency, section 734.

### **Person Cannot be Compelled to be a Witness Against Himself in a Criminal Action.**

A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself;

but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding. (Amendment, approved March 30, 1874; Amendments 1873-74, p. 451. In effect July 1, 1874.) Pen. Code, 1323.

No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense, be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge: Pen. Code, 688.

#### **Immaterial Questions need not be Answered.**

Pending the trial of an action, the petitioner was called as a witness, and asked by the judge whether anyone connected with the office of an attorney for one of the parties who had been present at the trial, had made any statements to him as to what had transpired during its progress. The petitioner refused to answer, and was adjudged guilty of contempt and imprisoned. He thereupon sued out the present writ of habeas corpus to be discharged from the imprisonment. Neither the petition for the writ nor the return thereto contained any allegations showing the pertinency of the question to the issues on trial. Held, that the refusal to answer the question was not a contempt: *Ex parte Zeehandelaar*, 71 Cal. 238, 239.

#### **Right to Claim Privilege.**

Where a witness who was subpoenaed before the grand jury refused to answer questions propounded to him on the grounds that the questions were not pertinent to the matter under inquiry, and that the answers might tend to incriminate him and degrade his character, it is sufficient to sustain a punishment for contempt for refusal to answer that the one question so included appears to have been pertinent to the charge under inquiry, and that it did not appear and was not fairly shown to the court that an answer

of the witness thereto would have a tendency to incriminate him or to degrade his character: In re Rogers, 129 Cal. 468, 62 Pac. 47.

A witness in a criminal case cannot constitute himself an arbitrary or exclusive judge as to whether or not the evidence called for by a question would tend to convict him of a felony; but it is a matter which the trial court is to decide, subject to review by the appellate court: Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372.

Both the immunity conferred upon the witness by purity of elections act, and the province of the trial court, and not of the witness, to determine to its own satisfaction the question as to whether the evidence sought tends to criminate or degrade him, constitute it error for the trial court to exclude answers upon the naked declaration of the witness that questions asked to prove offenses by the defendant would tend to criminate or degrade the witness: Bradley v. Clark, 133 Cal. 196, 65 Pac. 395.

A punishment for contempt cannot properly be based upon the ground that the witness testified upon the preliminary examination, and thereby waived his right to refuse to testify at the trial, upon the ground that his evidence would tend to convict him of a felony: Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372.

The provision of article 1, section 13, of the constitution of this state, that "no person shall be compelled, in a criminal case, to be a witness against himself," is to be construed as protecting a witness from being compelled to give any evidence which, in a criminal prosecution against himself, might in any degree tend to establish the offense with which he may be charged; but it is only when his evidence may tend to establish an offense for which he may be punished under the laws of the state that he is protected by this provision, and in no case where he is not liable to prosecution or punishment is he privileged from answering upon the ground that the evidence may

tend to criminate him: *Ex parte Cohen*, 104 Cal. 524, 43 Am. St. Rep. 127, 38 Pac. 364.

The provision of section 13, article 1 of the constitution, that no person can be compelled in a criminal case to be a witness against himself, does not make it necessary that the examination should be attempted in a criminal prosecution against the witness, or that such prosecution should have been commenced and actually pending; but it is sufficient to bring a person within the immunity of the provision, that there is a law creating the offense under which the witness may be prosecuted, and which does not secure him against use in a criminal prosecution of the evidence that he may give, and in such case he cannot be compelled to answer in any collateral proceeding as to acts constituting such offense: *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230.

A proceeding in the nature of a *qui tam* action to enforce a penalty, no matter in what form the statute may clothe it, is, in its nature, a criminal case, and the defendant cannot be compelled to be a witness against himself: *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435.

If a witness discloses a part of a transaction, with which he was criminally concerned, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline to be cross-examined on the ground that his answers may incriminate or disgrace him: *People v. Freshour*, 55 Cal. 375.

Statements of a witness in an action are voluntary if he might have objected to answering the questions which elicited them, on the ground that to do so would criminate him, and failed to make such an objection: *People v. Wieger*, 100 Cal. 352, 34 Pac. 826.

A witness called to prove the illegal giving by the defendant, to the witness, of money received and used by him to aid and secure the defendant's election, and the illegal expenditure by the defendant of money paid to the witness, and other persons, in excess of the amount which he could lawfully expend, and an illegal promise by defendant to give to the

witness the patronage of the office to which he was elected, cannot claim immunity from any questions relating thereto which would tend to criminate or degrade him, the witness being fully protected by the provisions of section 32 of the purity of elections act: *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395.

A person giving evidence against other persons under the purity of election law is exempted by the terms of the law from indictment, information, prosecution or punishment for the offense with reference to which his testimony is given, and is not protected from answering as a witness upon the ground that the evidence which he may give may tend to criminate himself: *Ex parte Cohen*, 104 Cal. 524, 43 Am. St. Rep. 127, 38 Pac. 364.

Whether question put is pertinent or not, the witness may decline to answer, on the ground that to do so would tend to criminate him; but where the question is not pertinent the party introducing him may object thereto, and his objection should be sustained, whether the witness objects to answering or not. Thornton, J., reserves his opinion: *Sharon v. Sharon*, 79 Cal. 633, 674, 675, 22 Pac. 36, 131.

#### **Record, When Necessary to Prove Conviction.**

In order to discredit a witness by showing his conviction of an offense, the best evidence of the conviction is requisite: *People v. McDonald*, 39 Cal. 697.

It is not competent to prove by parol conviction of witness of an infamous offense, in order to discredit his testimony. The record of the conviction is the best evidence: *People v. Melvane*, 39 Cal. 614.

#### **Answers Tending to Degrade.**

It is the right of a witness to be protected by the court from irrelevant, improper, and insulting questions: *People v. Durrant*, 116 Cal. 179, 212, 48 Pac. 75.

Party to action who becomes witness in his own behalf has no greater privilege than any other witness, and may refuse to answer a question when the answer would tend to degrade his character: *People v. Reinhart*, 39 Cal. 449.

The only case where the witness is privileged from answering a question on the ground that his answer would disgrace him is when it is not pertinent to the issue: *Ex parte Rowe*, 7 Cal. 184.

Where the matter to which the question related was one of the facts in issue, the fact that the witness' reply would disgrace or degrade him does not shield him from answering the question: *Clark v. Reese*, 35 Cal. 89.

A party to an action cannot avail himself of the alleged error of the court in compelling his witness to answer a pertinent question proposed by the opposite party, where the witness had refused to answer on the ground that his reply would disgrace and degrade him. The privilege not to answer being personal to the witness, it is not in any sense the privilege of the party calling him. But, as to a party demanding an answer, the rule is otherwise if the court allows the privilege in a case where the witness fails to bring himself within the rule: *Clark v. Reese*, 35 Cal. 89.

' If a defendant called as a witness in his own behalf admits that he may have been at a house of ill-fame at the dates testified to, he cannot be asked on cross-examination, for the purpose of discrediting him and degrading his character, whether he did not remain all night at that house upon a certain date: *People v. Tiley*, 84 Cal. 651, 24 Pac. 290.

#### **Special Cases Where Exemption Cannot be Claimed.**

No privilege can be claimed for an answer to a preliminary question which can be answered by "yes" or "no": *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395.

No person sworn and examined before either house of the legislature or any committee thereof, can be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify, nor is any statement made or paper produced by any such witness competent evidence in any criminal proceeding against such witness; nor can such witness refuse to testify to any fact or to produce any paper touching which he is



examined, for the reason that his testimony or the production of such paper may tend to disgrace him or render him infamous. Nothing in this section exempts any witness from prosecution and punishment for perjury committed by him on such examination: Pol. Code, sec. 304.

Every person who obtains, or seeks to obtain, money or other thing of value from another person, upon a pretense, claim or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony. Upon the trial, no person otherwise exempt as a witness shall be excused from testifying as such concerning the offense charged, on the grounds that such testimony may incriminate himself, or subject him to public infamy, but such testimony shall not afterward be used against him in any judicial proceeding, except for perjury in giving such testimony: Pol. Code, 89.

No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may incriminate himself; but no prosecution can afterward be had against him for any offense concerning which he testified: Pol. Code, 334.

No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of either of the provisions of this chapter (relating to duels) upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding: Pol. Code, 232.

### **Previous Arrest.**

When the defendant testifies in chief about his birth, parentage, education, and business, he may be asked, on cross-examination, whether he had ever been arrested before: *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396.

If a defendant, who is on trial for a larceny, becomes a witness in his own behalf, a question put to him on cross-examination, as to whether he had not previously been arrested for another larceny, is not objectionable on the ground that the defendant cannot be shown to be guilty of the offense charged by showing that he had been accused of another crime: *People v. McCauley*, 45 Cal. 146.

### **Conviction of Felony.**

It is permissible to ask a witness who has been convicted of felony the nature of the felony of which he has been convicted. Where the witness answers such a question, although the objection thereto is sustained by the court, if the answer is not stricken out, the defendant is not injured: *People v. Putnam*, 129 Cal. 258, 61 Pac. 961.

The party seeking to impeach a witness may ask him on cross-examination whether a judgment and sentence had been pronounced against him for a felony: *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481.

Since the amendments of 1880 to the Penal Code, a defendant indicted for a felony, if he be a witness, may be asked the question whether he has previously been convicted of a felony, but such question only goes to the credibility of the witness: *People v. Johnson*, 57 Cal. 571.

A witness, on cross-examination, may be asked if he has not been convicted of a felony, and the party asking the question may also introduce the record of his conviction: *People v. Chin Mook Sow*, 51 Cal. 597.

The defendant was asked, over the objections of his attorneys: "Were you convicted of assault with intent to kill, in San Mateo county? If so, when?" Held, that it is not necessary to decide whether the question was a proper one or not. It is sufficient that the fact of the former conviction of the defendant was proved by a certified copy of the record, as well as by the evidence of a witness, and there was no evidence to the contrary. But on this point see

People v. Chin Mook Sow, 61 Cal. 600; People v. Rolfe, 61 Cal. 540.

### **Conviction of Misdemeanor.**

The record of a conviction of a misdemeanor is not admissible for the purpose of discrediting a witness, unless it is shown that the offense involved moral turpitude or infamy: People v. Carolan, 71 Cal. 195, 12 Pac. 52.

A witness cannot be asked on cross-examination, for the purpose of affecting his credibility, whether he had been arrested and convicted of a misdemeanor, and had been incarcerated in the county jail. Under section 2051 of the Code of Civil Procedure, evidence of such a character is limited to convictions for felonies: People v. Carolan, 71 Cal. 195, 12 Pac. 52.

Where a defendant in a criminal case is under cross-examination as a witness in his own behalf, the fact of his former conviction of a misdemeanor cannot be proved by his oral testimony. The record of conviction is the best evidence, and is indispensable: People v. Schenick, 65 Cal. 625, 4 Pac. 675.

### **§ 2066. Protection of Witness.**

It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

#### *Cross-references:*

Court to control mode of examination, section 2044; must make it as little annoying to witness as may be, section 2044; parties may put pertinent questions, section 2044; witness must answer all personal questions, sections 2064, 2065; answer tending to discredit, section 2065; collateral questions must be avoided, section 2068; recalling witness, section 2050.

See Jones on Evidence, section 814—Further illustrations of discretion of the court in conducting trial.

### **Security for Attendance.**

When a witness for the people in a criminal-case who is required to enter into an undertaking with sureties to appear and testify, is committed for failure to comply, and it appears that he is unable to procure sureties, he may be discharged, and his deposition may be forthwith taken on behalf of the people: *People v. Lee*, 49 Cal. 37.

The petitioner was committed to prison for not complying with an order of the superior court which required him to give an undertaking with sureties to appear and testify in a criminal action therein pending. Held, the court was not authorized to exact from a witness, who was not examined before the committing magistrate, such an undertaking. The power to require undertakings in such cases is confined to witnesses who are examined before the committing magistrate: *Ex parte Shaw*, 61 Cal. 58.

Infants and married women, who are material witnesses against the defendant, may be required to procure sureties for their appearance, as provided in the last section: *Pen. Code*, 880.

If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged: *Pen. Code*, 881.

### **Insulting Questions.**

It is the right of the witness to be protected by the court from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; and where a lady witness for the prosecution had testified courteously and positively on cross-examination that she had seen the defendant after a date named, it is not fair treatment or legitimate cross-examination of the witness for counsel for the defendant to remark interrogatively, "That is, you imagine you

have?" and such action justifies the interposition of the court to reprove the counsel and protect the witness: *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

#### **Unreasonable Detention of Witnesses.**

Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned: Const., art. 1, sec. 6.

A person who has been detained as a witness for ninety days, and after several continuances of the case not satisfactorily accounted for, is entitled to his discharge on habeas corpus; *Ex parte Dressler*, 67 Cal. 257, 7 Pac. 645.

#### **Previous Impeachment.**

The effort to discredit Stewart by asking him if he had not been impeached as a witness upon a trial of a cause other than the one in which he was then testifying, was properly checked by the court upon the defendant's objection. A witness cannot be called upon thus to discredit himself except in the mode prescribed by the statute: *Cockrill v. Hall*, 76 Cal. 192, 196.

### **§ 2067. Privilege of Witness from Civil Arrest.**

Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

#### *Cross-references:*

Service of subpoena, sections 1987, 1988; when witness not compelled to attend, section 1989; illegal arrest of witness in civil action is void, section 2068;

officer when liable, section 2069; discharge of witness, section 2070.

See Jones on Evidence, sections 805, 806.  
Privileged from arrest and service of process, section 805.

Same—Extent and nature of the privilege, section 806.

### § 2068. Wrongful Arrest of Witness—Penalty.

The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpoena, for the damages sustained by him in consequence of the arrest.

#### *Cross-references:*

Witness exonerated when served with subpoena, section 2067, and cross-references thereunder; officer making arrest is liable when, section 2069; discharge of witness, section 2070.

### § 2069. Officer, When Exonerated for Unlawful Arrest.

An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating—

1. That he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

*Cross-references:*

Witness served with subpoena exonerated from arrest, section 2067; arrest of witness in violation thereof is void, section 2068; and who may be discharged, section 2070; issuance of subpoena, section 1986.

**§ 2070. Discharge of Witness from Arrest.**

The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section 2067. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge. [Amendment

approved April 16, 1880; Amendments 1880, p. 116. In effect April 16, 1880.]

*Cross-references:*

Witness served with subpoena exonerated from arrest, section 2067; arrest of witness in violation thereof is void, section 2068; liability of arresting officer, section 2069; issuance of subpoena, section 1986; service of subpoena, section 1988.



## TITLE VI.

ON EVIDENCE IN PARTICULAR CASES, AND  
MISCELLANEOUS AND GENERAL PROVI-  
SIONS.Chapter I. Evidence in Particular Cases, §§ 2074-  
2079.II. Proceedings to Perpetuate Testimony, §§  
2083-2089.III. Administration of Oaths and Affirmations,  
§§ 2093-2095.

## IV. General Provisions, §§ 2101-2104.

## CHAPTER I.

## EVIDENCE IN PARTICULAR CASES.

## § 2074. Offer of performance.

Offer of performance.

§ 2075. Party paying money or making delivery is en-  
titled to receipt.

Right to receipt.

## § 2076. Objections to tender.

Objections to tender.

Waiver.

What is due offer.

## § 2077. Rules for construing descriptions.

Partially false description.

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## § 2078. Offer of compromise.

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Failure to object does not waive the rule.

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## § 2079. Confession of adultery.

What corroboration necessary in actions for divorce.

Confessions in actions for divorce.

## § 2074. Offer of Performance.

An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

*Cross-references:*

Objections to tender must be stated at the time, section 2076; offer of compromise, section 2078; person making payment or delivery may demand proper signature and receipt as condition, section 2075.

**Offer of Performance.**

An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor: Civ. Code, 1493.

An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform: Civ. Code, 1494.

An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer: Civ. Code, 1495.

The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance unless the offer is accepted: Civ. Code, 1496.

A written offer by the purchaser to surrender the title to the land purchased is equivalent to the actual production and tender of a written release or quitclaim: *Herberger v. Husman*, 90 Cal. 583, 585.

### § 2075. Party Paying Money or Making Delivery is Entitled to Receipt.

Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

#### *Cross-references:*

Presumptions from payment, section 1963, subdivision 7; presumptions from delivery, section 1963, subdivision 8; presumptions from surrender of obligation, section 1963, subdivision 9, and section 1963, subdivision 13; presumption from production of rent receipt, section 1963, subdivision 10.

See Jones on Evidence, sections 502-504.  
Parol evidence to explain receipts, section 502.  
Effect of receipts when not explained, section 503.  
Warehouse receipts, section 504.

#### **Right to Receipt.**

A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation: Civ. Code, 1499.

### § 2076. Objections to Tender.

The person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or

kind which he requires, or be precluded from objecting afterward.

*Cross-references:*

Written offer of payment is equivalent to actual production of money, section 2074.

**Objections to Tender.**

All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated: Civ. Code, 1501.

The purpose of requiring the objection to be stated, if it is to the amount, is to inform the debtor of the amount claimed: *Shafer v. Willis*, 124 Cal. 36, 56 Pac. 635.

See the sections applied in *Oakland Bank v. Applegarth*, 67 Cal. 86, 7 Pac. 139, 476; *Barnhart v. Fulkerth*, 73 Cal. 526, 15 Pac. 89; *Estate of Pearsons*, 102 Cal. 569, 36 Pac. 934.

In case of a severable contract for sale of different items of personal property, the refusal of the purchaser to accept a tender of one of the items does not operate to waive or excuse performance, or offer of performance, by the seller as to the other items: *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27.

The tender of the sum of money offered was refused as not being sufficient in amount as it is stated that the defendant would only receive it on account. This we think, was a sufficient specification of the reasons why the tender was not considered sufficient under section 2076 of the Code of Civil Procedure and section 1501 of the Civil Code: *Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 34, 43.

**Waiver.**

An action to recover the contract price of letters patent sold to the defendant, which were to be assigned to the defendant as soon as a settlement was made with another person, will not be defeated by

mere delay to make the assignment until nearly three years after the settlement, if the defendant received all of the benefit he would have received if the letters had been actually assigned at the proper time, and the delay was acquiesced in by both parties; and in such case the purchaser is estopped from claiming that the tender of the assignment came too late: *Scott v. Jackson*, 89 Cal. 258, 263.

A tender or offer of performance must be free from any conditions which the creditor is not bound on his part to perform; yet if it is accompanied by improper conditions which the creditor is not bound to perform, and no objection is made thereto by the creditor, all objections to the improper conditions are waived: *Kofoed v. Gordon*, 122 Cal. 314, 322.

Where the composition agreement provided for the payment of a certain sum and the execution of a note, the fact that money was tendered on one day and the note on another is immaterial if no objection was made at the time of the tender to its sufficiency: *Schroeder v. Pissis*, 128 Cal. 209, 213.

### **What is a Due Offer.**

A tender by the assignee in insolvency of ten dollars in satisfaction of any indebtedness of the insolvent debtor to the bank accompanied by a demand of the pledged stock, which was rejected by the bank, was not a due offer of payment to extinguish an indebtedness of nearly twenty thousand dollars; and objection to such undue offer cannot be deemed waived because of failure to object specifically to the mode of the rejected tender: *Colton v. Oakland Bank of Savings*, 137 Cal. 376, 382.

The failure of the vendor to object to a written offer by the purchaser under a contract for the sale of real estate to pay the principal sum of purchase money due, which sum was present, and counted by the vendor's clerk at his request, is a waiver of objection to the offer and tender, and precludes the vendor from afterward objecting that the interest was not included in the tender, or that the tender was too indefinite. The purchaser was not required to

produce the money to constitute a valid tender where the vendor did not accept the offer made or comply with his demand for a deed: *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 288.

### § 2077. Rules for Construing Descriptions.

The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars;

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both;

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except

where the road or thread of the stream is held under another title;

5. When tide-water is the boundary the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark, are included in the conveyance;

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars. [Amendment approved March 24, 1874; Amendments 1873-74, p. 390. In effect July 1, 1874.]

*Cross-references:*

Common reputation admissible in cases of boundary, section 1870, subdivision 11; construction of writings is question of law for the court, section 2102; intent to govern in matters of construction, section 1858; particular intent to govern general intent, section 1859; usage to aid construction, section 1870, subdivision 12; evidence admissible to prove that words of a construction have a local, technical or peculiar signification, section 1861; conveyances as evidence, section 1951; public maps admissible as evidence, section 1936.

**Partially False Descriptions.**

The description of land in a decree of distribution is not required to be so specific that the land can be identified without the aid of extrinsic evidence; nor

is it material that the description be false in part, if what remains is sufficient for the purpose of identification: *Wheeler v. Bolton*, 66 Cal. 83, 86.

#### **Monuments Paramount to Surfaces.**

A judgment in ejectment which describes the land recovered as "bounded on the north by the north boundary" of the south half of a specified quarter section, "on the east by the east boundary thereof, and on the south and west by the fence of the defendant, containing about 10.62 acres," is not to be construed as limiting the land recovered to that quantity, and the defendant cannot remove his fence so as to relinquish the possession of 10.62 acres only. The boundaries being fixed by ascertained monuments, the words "about 10.62 acres" may be rejected as surplusage; and the plaintiff is entitled to the possession of all of the land within the boundaries described, which are paramount to the estimated quantity of surface: *Dutra v. Pereira*, 135 Cal. 320, 321.

#### **Sonoma Pueblo Lands.**

The owner of land bounded by a road or street is presumed to own to the center of the way, unless the contrary be shown; and if the land be described in a deed as so bounded, it is presumed to extend to the center of the street or road, unless a contrary intention appear. This rule obtains as to sales of Sonoma pueblo lands made by the pueblo commissioners under the act of March 30, 1868: *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 202, 206.

#### **§ 2078. Offer of Compromise.**

An offer of compromise is not an admission that anything is due.

#### *Cross-references:*

Admissions may be proven on trial, section 1870, and cross-references thereunder.

See *Jones on Evidence*, section 293—Offers of compromise.



**Offer of Judgment.**

The defendant may, at any time, before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer. (Amendment approved March 24, 1874; Amendments 1873-74, p. 341. In effect July 1, 1874.) Code Civ. Proc., 997.

**Failure to Object does not Waive the Rule.**

It was probably error for the court to allow the plaintiff's counsel to argue to the jury, against the protest of the defendants, that the offer of one of the then partners to pay a certain sum and counsel fees in settlement of the claim was an admission that something was due. It is true that the testimony as to the offer came in without objection. But the statute expressly says that "an offer to compromise is not an admission that anything is due." The failure to object to the admission of evidence can hardly make that admission which the law expressly declares is not so: *Scott v. Wood*, 81 Cal. 398, 405.

**§ 2079. Confession of Adultery.**

In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce.

*Cross-references:*

Admissions as evidence, section 1870, and cross-references thereunder.

See Jones on Evidence.

Admissions of husband and wife, section 262.

Same—Power to make admissions—How inferred, section 263.

Same—In actions for divorce, section 264.

### **What Corroboration Necessary in Actions for Divorce.**

Though the court cannot grant a divorce on the ground of extreme cruelty of the husband upon the uncorroborated testimony of the wife, it is not under such restraint when considering whether the leaving of the husband by the wife constituted willful desertion, or was justified by his cruel treatment, and upon that issue the court may believe the uncorroborated testimony of the wife as against the testimony of the husband: *White v. White*, 86 Cal. 219, 24 Pac. 996.

Under section 130 of the Civil Code, providing that no divorce shall be granted upon the uncorroborated statement, admission, or testimony of the parties, the testimony of the plaintiff need not be corroborated as to every fact, and circumstance, but it is enough if the facts corroborated are sufficient to support the action, and justify the entry of a decree in the plaintiff's favor: *Cooper v. Cooper*, 88 Cal. 45, 25 Pac. 1062; *Evans v. Evans*, 41 Cal. 103; *Matthai v. Matthai*, 49 Cal. 90; *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499.

Where the defendant is charged with many acts of extreme cruelty, extending through a period of years, the testimony of plaintiff as to a course of extreme cruelty on the part of the defendant, and evidence of his admission of cruelty to another witness, is sufficiently corroborated by further proof of one of the acts of cruelty alleged in the complaint: *Cooper v. Cooper*, 88 Cal. 45, 25 Pac. 1062.

The institution of a former suit by the defendant against the plaintiff, without any cause, the complaint in which contained extremely cruel and unjust charges, such as no husband should be permitted to make against his wife, if untrue, is an act of cruelty, which is sufficiently corroborated by evidence of the complaint containing the charges and of the voluntary dismissal of the action, and by testimony of a

witness as to its cruel effect upon the defendant: *Cooper v. Cooper*, 88 Cal. 45, 25 Pac. 1062.

Case where the evidence of the party seeking a divorce was sufficiently corroborated under section 130 of the Civil Code: *Matthai v. Matthai*, 49 Cal. 90.

No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers. (Amendment approved March 30, 1874; Amendments 1873-74, 191. In effect July 1, 1874.) Civ. Code, 130.

In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel; provided, that in any cause the court may, in the exercise of a sound discretion during the examination of a witness, exclude any or all other witnesses in the cause: Civ. Code, 125.

Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from excessive acts of ill-treatment, which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone. (Amendment approved March 30, 1874; Amendments 1873-74, 190. In effect July 1, 1874.) Civ. Code, 118.

### **Confessions in Actions for Divorce.**

In an action to obtain a divorce, the confessions or admissions of the defendant can be given in evidence: *Evans v. Evans*, 41 Cal. 103.

This was the rule of the common and English ecclesiastical law, and our statute is merely affirmatory of that rule: *Baker v. Baker*, 13 Cal. 87.

## CHAPTER II.

### PROCEEDINGS TO PERPETUATE TESTIMONY.

- § 2083. Testimony of witness may be perpetuated.
- § 2084. Contents of petition.
- § 2085. Authority of person appointed to take deposition.
- § 2086. Modes of examination.
- § 2087. Petition and order prima facie evidence.
- § 2088. When depositions may be used.
- § 2089. Effect of deposition as evidence.

#### § 2083. Testimony of Witness May be Perpetuated.

The testimony of a witness may be taken and perpetuated as provided in this chapter.

#### *Cross-references:*

Manner of application for order for perpetuation of testimony, section 2084; notice of taking deposition, section 2084; service of notice, section 2084; authority of person appointed to take deposition, section 2085; manner of taking deposition, section 2086; deposition to be filed, section 2087; when evidence may be produced, section 2088; effect of deposition, section 2089.

#### § 2084. Contents of Petition.

The applicant must produce to a judge of the superior court a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be personally served, and if unknown, such notice must be served on the clerk of the county where the property to be affected by such evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his or-

der the clerk of the county to whom the deposition must be returned when taken. [Amendment approved April 16, 1880; Amendments 1880, p. 116. In effect April 16, 1880.]

*Cross-references:*

Authority of person authorized to take deposition, section 2085; manner of taking examination, section 2086; proof of service of notice, section 2085; evidence of what facts may be given on the trial, section 1870; petition and order are prima facie evidence of facts therein contained, section 2089; effect of judgment in rem, section 1908.

See Jones on Evidence, section 720—Depositions to perpetuate testimony.

**§ 2085. Authority of Person Appointed to Take Deposition.**

The person appointed by the judge to take the depositions is authorized, if a resident of this state, on receiving a copy of the order of the judge, and of the notice prescribed in the last section, with proof of its personal service or publication—or, if a resident without the state, on receiving the commission mentioned in the next section, with proof of like service of publication of the notice—to take the deposition of the witnesses named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time.

[Amendment approved March 24, 1874; Amendments 1873-74, p. 392. In effect July 1, 1874.]

*Cross-references:*

Appointment of person to take deposition, section 2084; witness defined, section 1878, and cross-references thereunder; effect of deposition as evidence, section 2889; person authorized to take deposition is authorized to administer oath, section 2093; affidavit of publication by whom made, section 2010; where filed, section 2011.

**§ 2086. Modes of Examination.**

The examination must be by question and answer, and if the testimony is to be taken in another state, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the clerk of the county designated in the order of the judge allowing the examination, who shall

file the same when received. The judge allowing the examination shall file with the clerk the order for the examination, the petition on which the same was granted, with proof of service of the order and notice. [Amendment approved March 24, 1874; Amendments 1873-74, p. 392. In effect July 1, 1874.]

*Cross-references:*

Deposition must be upon question and answer, section 2006; deposition may be excluded upon proof that sufficient notice was not given, or that it was not fair, section 2033; deposition of witness out of the state when taken, section 2020; how taken, sections 2024, 2028; papers when filed are prima facie evidence, section 2087.

**§ 2087. Petition and Order Prima Facie Evidence.**

The petition and order, and papers filed by the judge as provided in section 2086, or a certified copy thereof, are prima facie evidence of the facts stated therein to show compliance with the provisions of this chapter. [Amendment approved March 24, 1874; Amendments 1873-74, p. 393. In effect July 1, 1874.]

*Cross-references:*

Form and contents of petition, section 2084; order for taking deposition, section 2084; notice of taking deposition, section 2085; proof of service of same, section 2085; papers to be filed by judge, section 2086; prima facie evidence defined, section 1833.



**§ 2088. When Depositions May be Used.**

If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination. [Amendment approved March 24, 1874; Amendments 1873-74, p. 393. In effect July 1, 1874.]

*Cross-references:*

Proof of continuance of absence of witness, section 2032; proof of continuance of infirmity of witness, section 2032; when testimony of deceased witness or witnesses unable to testify may be given, section 1870, subdivision 8.

**§ 2089. Effect of Deposition as Evidence.**

The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness or to the relevancy of any question put

to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

*Cross-references:*

Deposition is subject to all legal exceptions, section 2032; except as to form of interrogatory, sections 2088, 2032.

### CHAPTER III.

#### ADMINISTRATION OF OATHS AND AFFIRMATIONS.

- § 2093. Who may administer oath.  
Who may administer oaths.  
Who may not.
- § 2094. Form of oath.  
Failure to swear witnesses.  
Substantially the same as code.
- § 2095. Peculiar modes of swearing.  
This section is not mandatory.
- § 2096. Oaths of non-Christians.  
Oath of Chinese.
- § 2097. Affirmation.  
Oath includes affirmation.

#### § 2093. Who May Administer Oath.

Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

#### *Cross-references:*

Commissioner to take testimony out of this state, section 2024; commissioner must be authorized to take oaths, section 2026; person authorized to administer oaths may take deposition of witness of this state, section 2031; commissioner to take testimony

to be used in foreign state, section 2038; form of oath, sections 2094, 2095, 2096; affirmation, section 2097.

See Jones on Evidence, section 730—Competency of witnesses—Oath.

### **Who May Administer Oaths.**

Every judicial officer shall have power to administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties: Code Civ. Proc., 177.

Every court shall have power:

1. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;

2. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties: Code Civ. Proc., 128.

Every officer mentioned in section 4103, and every justice of the peace, may administer and certify oaths: Pol. Code, 4118.

The officers of a county are: A county judge; a treasurer; a county clerk; an auditor; a sheriff; a tax collector; a district attorney; a recorder; an assessor; a surveyor; a school superintendent; a coroner; a public administrator; a board of supervisors; and in counties of the first class, for highway purposes, a commissioner of highways: Pol. Code, 4118.

The foreman may administer an oath to any witness appearing before the grand jury: Pol. Code, 918.

To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties: Code Civ. Proc., 177.

To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties: Code Civ. Proc., 128.

Every executive and judicial officer may administer and certify oaths: Pol. Code, 1028.

**Who May Administer Oaths.**

The clerk of the police court of Los Angeles has authority to administer an oath to a person verifying a complaint: *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305.

A notary, an attorney at law, may administer an oath to his own client (*Reavis v. Cowell*, 56 Cal. 588), where affidavits used on motion to change the place of trial were sworn to before affiant attorney. If the statute requires an oath to be administered by the court or judge, and it is administered by the clerk in open court, under the direction of the court, and tested by the clerk, it is administered by the court in the sense of the statute: *Oakes v. Rodgers*, 48 Cal. 197.

There is no question that the notary was an officer legally authorized to take and certify acknowledgments to written instruments and to administer oaths and take testimony of that purpose: *Ex parte Carpenter*, 64 Cal. 267, 269.

A district attorney has general authority to administer and certify oaths, under sections 1028, 4103, and 4118 of Political Code, and may take and certify the verification of a pleading to be used in the superior court: *Haile v. Smith*, 128 Cal. 415, 420.

Section 2102 of the Code of Civil Procedure, providing that "an affidavit to be used before any court, judge or officer of this state may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this state," is not to be deemed exclusive of the power conferred by the Political Code upon the district attorney; but the provisions of the two codes are to be deemed cumulative: *Haile v. Smith*, 128 Cal. 415, 420.

Where a general authority is given to an officer "to administer and certify oaths," that authority cannot be limited by judicial construction to particular kinds of oaths, and must be held to extend to the verification of pleadings: *Haile v. Smith*, 128 Cal. 415, 420.

**Who May not.**

A United States court commissioner cannot administer an oath for a creditor's claim against a decedent: *Winder v. Hendricks*, 56 Cal. 464.

**§ 2094. Form of Oath.**

An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter) pending between — and —, shall be the truth, the whole truth, and nothing but the truth, so help you God." [Amendment approved March 24, 1874; Amendments 1873-74, p. 393. In effect July 1, 1874.]

*Cross-references:*

Who may administer oaths, section 2093; form of oath when witness has peculiar mode of swearing, section 2095; form of oath of non-Christian, section 2096; form of affirmation, section 2097.

See *Jones on Evidence*, section 730—Competency of witnesses—Oath.

**Failure to Swear Witnesses.**

Affidavit merely stating that the arbitrators failed to swear the witnesses, without showing that the appellant asked to have them sworn, or objected to their not being sworn, or excepted to their unsworn statements, does not show any misconduct of the arbitrators: *Arbitration between Connor and Pratt*, 128 Cal. 279, 60 Pac. 862.

**Substantially the Same as Code.**

Where the form of oath prescribed by section 2094 of the Code of Civil Procedure, as it stood prior to the unconstitutional amendment of March 4, 1901, was administered to the witnesses in a criminal case, with the exception of the invocation for God's help, there is no substantial departure; and false testimony thereunder will constitute perjury: *People v. Swist*, 136 Cal. 520, 521.

**§ 2095. Peculiar Modes of Swearing.**

Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may in its discretion, adopt that mode.

*Cross-references:*

Oath of non-Christian, section 2096; form of affirmation, section 2097; form of oath, section 2094; who may administer oaths, section 2093; witness not excluded on account of his opinions on matters of religious belief, section 1879.

See *Jones on Evidence*, section 733—Oath or equivalent still required.

**This Section is not Mandatory.**

Sections 2095 and 2096 of the Code of Civil Procedure are not mandatory, but merely permissive at the discretion of the court to adopt a peculiar mode of swearing a witness who regards such mode as more solemn or obligatory, or according to the peculiar ceremonies of his religion; and in order to show abuse of the discretionary power conferred, in refusing to administer a peculiar oath to a Chinese witness, it must be made to appear that the court was informed that the witness regarded some other

form more obligatory than the form adopted in this state, and perhaps that he did not consider the latter at all obligatory: *People v. Green*, 99 Cal. 564, 24 Pac. 231.

### § 2096. Oaths of Non-Christians.

When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

#### Oath of Chinese.

Sections 2095 and 2096 of the Code of Civil Procedure are not mandatory, but merely permissive at the discretion of the court to adopt a peculiar mode of swearing a witness who regards such mode as more solemn or obligatory, or according to the peculiar ceremonies of his religion, and in order to show an abuse of the discretionary power conferred in refusing to administer a peculiar oath to a Chinese witness, it must be made to appear that the court was informed that the witness regarded some other form more obligatory than the form adopted in this state, and perhaps that he did not consider the latter at all obligatory: *People v. Green*, 99 Cal. 564, 569.

#### *Cross-references:*

Who may administer oaths, section 2093; form of oaths, section 2094; form where witness has peculiar manner of swearing, section 2095; form of affirmation, section 2097; witness not excluded on account of his opinions on matters of religious belief, section 1879.

See *Jones on Evidence*, section 733—Oath or equivalent still required.

### § 2097. Affirmation.

Any person who desires it may, at his option, instead of taking an oath, make his solemn af-



firmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that," etc., as in section 2094.

*Cross-references:*

Who may administer affirmation, section 2093; form of oath, section 2094; oath of witness who has peculiar mode of swearing, section 2095; oath of non-Christian, section 2096; witness not excluded on account of his opinions on matters of religious belief, section 1879.

See Jones on Evidence, section 733—Oath or equivalent still required.

**Oath Includes Affirmation.**

The term "oath," as used in the last section (defining perjury) includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated: Pol. Code, 119.

In this code, oath includes affirmation or declaration; and every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose": Pen. Code, 7; Pol. Code, 17; Code Civ. Proc., 17.

## CHAPTER IV.

## GENERAL PROVISIONS.

§ 2101. Questions of fact.

§ 2102. Questions of law.

Instruction on fact of which judicial notice is taken.

§ 2103. Provisions applicable to all trials.

Grand juries may receive only legal evidence.

§ 2101. Questions of Fact.

All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code. [Amendment approved March 24, 1874; Amendments 1873-74, p. 394. In effect July 1, 1874.]

*Cross-references:*

Questions of law are addressed to the court, section 2102; judicial knowledge, section 1875; effect of evidence is a question for the jury, section 2061, and cross-references thereunder; jury are exclusive judges of credibility of witnesses, sections 1847, 2061, subdivision 2; how inferences must be founded, section 1960; jury may compare handwriting, section 1944.

See Jones on Evidence, sections 171-173.  
Province of the judge and jury, section 171.

Same—Mixed questions of law and fact—Construction of writings—Statutes, etc., section 172.

The court decides questions of law—Criminal cases, section 173.

### § 2102. Questions of Law.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

#### *Cross-references:*

Construction of statutes, sections 1858, 1859; alteration of instruments, section 1982; experts, section 1870, subdivision 9; construction of writing, sections 1858-1865, inclusive; construction of written notice, section 1863; knowledge of the court, section 1875.

See Jones on Evidence, sections 171, 172, 201.

Province of the judge and jury, section 171.

Same—Mixed questions of law and fact—Construction of writings—Statutes, etc., section 172.

The rule does not exclude evidence unless objection is made, section 201.

#### **Instruction on Fact of Which Judicial Notice is Taken.**

The court will take judicial notice of the time when the moon rose on a particular night, and it may inform itself from any source of information; and it is not competent to assail the correctness of an instruction to the jury upon that subject by affidavits contradictory of the correctness of the statement of the

court; and, in the absence of manifest error, the fact as stated by the trial court will be presumed correct on appeal, and appellant must show affirmatively that the court erred in its statement: *People v. Mayes*, 113 Cal. 618, 625.

### § 2103. Provisions Applicable to All Trials.

The provisions contained in this part of the code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer.

#### *Cross-references:*

What may be proven on trial, section 1870; effect of evidence, section 2061; province of court, section 2102; questions of fact to be addressed to the jury, section 2101.

#### **Grand Juries May Receive Only Legal Evidence.**

In the investigation of a charge for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in the third subdivision of section 686. The grand jury can receive none but legal evidence, and the best evidence in degree to the exclusion of hearsay or secondary evidence: *Pen. Code, sec. 919.*

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